No. 04-37

Supreme Court, U.S.
FILED
NOV 12 2004
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In The Supreme Court of the United States

MICHAEL CLINGMAN, GLO HENLEY, KENNETH MONROE, THOMAS PRINCE AND THE OKLAHOMA STATE ELECTION BOARD,

Petitioners,

v.

ANDREA L. BEAVER, FLOYD TURNER, MINELLE L. BATSON, MARY V. BURNETT, SHARON LYNN ATHERTON, ROGER BLOXHAM, STEVE GALPIN, RICHARD P. PRAWDZIENSKI, MICHAEL CLEM, WHITNEY L. BONTIN, JR., CHRISTOPHER S. POWELL, CHARLES A. BURRIS AND THE LIBERTARIAN PARTY OF OKLAHOMA A/K/A LIBERTARIAN POLITICAL ORGANIZATION,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed July 2, 2004
Certiorari Granted September 28, 2004

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The Memorandum Opinion of the United States District Court for the Western District of Oklahoma is not reproduced in the Joint Appendix but was reproduced in the Petition for Writ of Certiorari at Appendix 24

RELEVANT DOCKET ENTRIES

General Docket
United States Court of Appeals for the 10th Circuit

2/26/03 [1591109] Civil case docketed. Preliminary record filed. DATE RECEIVED: 02/26/03. Transcript order form due 3/10/03 for Tracy Washbourne pursuant to R.42.1. Docketing statement due 3/10/03 for Libertarian Party, et al. Notice of appearance due 3/10/03 for Ok. St. Election Bd., et al. and Libertarian Party, et al.. (bjv)

2/28/03 [1591712] Transcript order form filed by Tracy Washbourne. Transcript due 4/25/03 for Tracy Washbourne. (bjv)

3/3/03 [1592356] Notice of appearance filed by James C. Linger as attorney for Andrea L. Beaver, Floyd Turner, Minelle L. Batson, Mary Y. Burnett, Michael L. Seymour, Terry L. Beaver, Robert T. Murphy, Sharon Lynn Atherton, Roger Bloxham, Steve Galpin, Richard P. Prawdzienski, Michael Clem, Whitney L. Boutin, Christopher S. Powell, Charles A. Burris and Libertarian Party. CERT. OF INTERESTED PARTIES (y/n): y. (lg)

3/3/03 [1592357] Docketing statement filed by Andrea L. Beaver, Floyd Turner, Minelle L. Batson, Mary Y. Burnett, Michael L. Seymour, Terry L. Beaver, Robert T. Murphy, Sharon Lynn Atherton, Roger Bloxham, Steve Galpin, Richard P. Prawdzienski, Michael Clem, Whitney L. Boutin, Christopher S. Powell, Charles A. Burris and Libertarian Party. Original and 4 copies, c/s: y. (lg)

3/12/03 [1595057] Notice of appearance filed by Wellon B. Poe as attorney for Michael Clingman, Glo Henley, Kenneth Monroe, Thomas E. Prince, Ok. St. Election Bd.. CERT. OF INTERESTED PARTIES (y/n): n (jet)

* * *

6/16/03 [1620684] Appellants' brief filed by Andrea L. Beaver, Floyd Turner, Minelle L. Batson, Mary Y. Burnett, Michael L. Seymour, Terry L. Beaver, Robert T. Murphy, Sharon Lynn Atherton, Roger Bloxham, Steve Galpin, Richard P. Prawdzienski, Michael Clem, Whitney L. Boutin, Christopher S. Powell, Charles A. Burris and Libertarian Party. Original and 7 copies. c/s: y. Served on 6/13/03. Oral argument? y. Appendix filed. Original and 1 appendix copy. Appendix Pages: 316. Appellees' brief due 7/16/03 for Ok. St. Election Bd., Thomas E. Prince, Kenneth Monroe, Glo Henley, and Michael Clingman. (afw)

7/18/03 [1628745] Appellee's brief filed by Michael Clingman, Glo Henley, Kenneth Monroe, Thomas E. Prince, and Ok. St. Election Bd. Original and 7 copies. c/s: y. Served on 7/16/03. Oral Argument? n. Appellant's optional reply brief due 8/4/03 for Libertarian Party, Charles A. Burris, Christopher S. Powell, Whitney L. Boutin, Michael Clem, Richard P. Prawdzienski, Steve Galpin, Roger Bloxham, Sharon Lynn Atherton, Robert T. Murphy, Terry L. Beaver, Michael L. Seymour, Mary Y. Burnett, Minelle L. Batson, Floyd Turner, and Andrea L. Beaver. (kr)

8/4/03 [1632737] Appellant's reply brief filed by Andrea L. Beaver, et al. Original and 7 copies. c/s: y (lg)

* * *

1/14/04 [1678166] Case argued by James C. Linger, for appellant and Wellon B. Poe, Jr., for appellee; Submitted to Judges Kelly, Lucero, O'Brien. (ss)

4/6/04 [1698773] Terminated on the Merits after Oral Hearing; Reversed; Remanded. Written, Signed, Published. Kelly; Lucero, authoring judge;

O'Brien. [03-6058] Parties served by mail on 4/6/04. (oac)

* * *

4/28/04 [1704271] Mandate issued to district court. Mandate receipt due 5/28/04. (afw)

* * *

U.S. District Court – Western District of Oklahoma
Civil Docket For Case # : 5:00-cv-01071

Date Filed	#	Docket Text
06/16/2000	1	COMPLAINT (eh) (Entered: 06/19/2000
		* * *
06/27/2000	8	MOTION by plaintiffs for preliminary injunction (ap) (Entered: 06/28/2000)
06/27/2000	9	BRIEF FILED by plaintiffs in support of motion for preliminary injunction [8-1] (ap) (Entered: 06/28/2000)
		* * *
07/17/2000	14	RESPONSE IN OPPOSITION by defendant Lance Ward, defendant Kenneth Monroe, defendant Thomas E Prince, defendant State Election Board, defendant Glo Henley to motion for preliminary injunction [8-1] (cjs) (Entered: 07/18/2000)
07/17/2000	15	JOINT STIPULATED FACTS/NOTICE by plaintiff Andrea L Beaver, plaintiff Floyd Turner, plaintiff Minelle L Batson, plaintiff Mary Y Burnett, plaintiff Michael L Seymour, plaintiff Terry L Beaver, plaintiff Robert T Murphy, plaintiff Sharon Lynn Atherton, plaintiff Roger Bloxham, plaintiff Steve Galpin, plaintiff Richard P Prawdzienski, plaintiff Michael A Clem, plaintiff Whitney L Boutin Jr, plaintiff Christopher S Powell, plaintiff Charles A Burris, plaintiff Libertarian Party OK, defendant Lance Ward, defendant Kenneth Monroe, defendant Thomas E Prince, defendant

		State Election Board, defendant Glo Henley (cjs) (Entered: 07/18/2000)
07/17/2000	16	ANSWER by defendant Lance Ward, defendant Kenneth Monroe, defendant Thomas E Prince, defendant State Election Board, defendant Glo Henley (cjs) (Entered: 07/18/2000)
		* * *
07/20/2000	17	SUPPLEMENTAL by all parties Joint Stipulation of Fact (fp) (Entered: 07/20/2000)
		* * *
07/24/2000	19	ORDER by Honorable Tim Leonard denying plf's motion for preliminary injunction [8-1] (cc: all counsel) [EOD Date 7/24/00] (ap) (Entered: 07/24/2000)
		* * *
09/14/2000	23	AMENDED COMPLAINT [1-1] by plaintiffs Andrea L Beaver, Floyd Turner, Minelle L Batson, Mary Y Burnett, Michael L Seymour, Terry L Beaver, Robert T Murphy, Sharon Lynn Atherton, Roger Bloxham, Steve Galpin, Richard P Prawdzienski, Michael A Clem, Whitney L Boutin Jr, Christopher S Powell, Charles A Burris, Libertarian Party OK (ap) (Entered: 09/14/2000)
09/19/2000	24	ANSWER by defendant Lance Ward, defendant Kenneth Monroe, defendant Thomas E Prince, defendant State Election Board, defendant Glo Henley (cjs) (Entered: 09/20/2000)

* * *

07/16/2001 35 MOTION by defendant Lance Ward, defendant Kenneth Monroe, defendant Thomas E Prince, defendant State Election board, defendant Glo Henley for summary judgment and brf in supp (ap) (Entered: 07/17/2001)

* * *

08/16/2001 38 RESPONSE by plaintiffs to dfts' motion for summary judgment [35-1] (ap) (Entered: 08/16/2001)

08/16/2001 39 SUGGESTION on Record for Substitution of Pty Dft by plaintiff Andrea L Beaver (ap) (Entered: 08/17/2001)

08/20/2001 40 ORDER by Honorable Tim Leonard Michael Clingman, Sec of Okla St Election Bd is substituted as pty dft in place of Lance Ward, Sec of Okla St Election Bd re [39-1] (cc: all counsel) [EOD Date 8/20/01] (ap) (Entered: 08/20/2001)

* * *

10/09/2001 45 SUPPLEMENT by plaintiffs re motion response [38-1] to dft's Mtn Summ Jgm (ap) (Entered: 10/10/2001)

* * *

12/05/2001 49 PROPOSED Findings of fact and conclusions of law by plaintiffs (ap) (Entered: 12/07/2001)

12/05/2001 50 TRIAL brief submitted by plaintiffs (ap) (Entered: 12/07/2001)

12/05/2001 51 PROPOSED Findings of fact and conclusions of law by defendants (ap) (Entered: 12/07/2001)

12/05/2001 52 TRIAL brief submitted by defendants (ap) (Entered: 12/07/2001)

* * *

12/11/2001 54 ORDER by Honorable Stephen P. Friot denying dfts' motion for summary judgment [35-1] (cc: all counsel) [EOD Date 12/11/01] (ap) (Entered: 12/11/2001

* * *

11/25/2002 63 AMENDED AND SUPPLEMENTAL Trial Brief of defendants re [52-1] (ap) (Entered: 11/26/2002)

11/25/2002 64 AMENDED JOINT PRE-TRIAL REPORT (ap) (Entered: 11/26/2002)

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11/25/2002 66 AMENDED PROPOSED Findings of fact and conclusions of law by plaintiffs (ap) (Entered: 11/26/2002)

12/02/2002 67 NON-JUR TRIAL COURTROOM MINUTES: Trial began before the Honorable Stephen P. Friot; plf's cnsl Jim Linger; dft's cnsl Wellon B Poe; ptys announce ready; plf – dft make opening statement; plf presents case in chief with testimony of witnesses; plf rests; non-jury trial began 12/2/02 (ap) (Entered: 12/04/2002)

12/03/2002 68 FURTHER NON-JURY TRIAL COURTROOM MINUTES: Before the honorable

Stephen P. Friot; plf's cnsl Jim Linger; dft's cnsl Wellon Poe; dft presents case in chief with testimony of witnesses; dft rests; Case taken under advisement; non-jury trial ends 12/3/02 (ap) (Entered: 12/04/2002)

12/04/2002 69 ORDER by Honorable Stephen P. Friot the proposed Amended Final Pre-Trial Report re [64-1] is approved (cc: all counsel) [EOD Date 12/4/02] (ap) (Entered: 12/04/2002)

01/24/2003 70 MEMORANDUM OPINION: by Honorable Stephen P. Friot (cc: all counsel) (cjs) (Entered: 01/24/2003)

01/24/2003 71 JUDGMENT: by Honorable Stephen P. Friot re [70-1], dismissing case (cc: all counsel) (cjs) (Entered: 01/24/2003)

02/21/2003 72 NOTICE OF APPEAL by plaintiff Andrea L Beaver, plaintiff Floyd Turner, plaintiff Minelle L Batson, plaintiff Mary Y Burnett, plaintiff Michael L Seymour, plaintiff Terry L Beaver, plaintiff Robert T Murphy, plaintiff Sharon Lynn Atherton, plaintiff Roger Bloxham, plaintiff Steve Galpin, plaintiff Richard P Prawdzienski, plaintiff Michael A Clem, plaintiff Whitney L Boutin Jr, plaintiff Christopher S Powell, plaintiff Charles A Burris from Dist. Court decision transcript order set for 3/6/03 [71-1], [70-1] (dl) (Entered: 02/24/2003)

* * *

04/28/2003 TRANSCRIPT of Non-Jury Trial held on December 2, 2002, Vol. I of II by

CSR Tracy Washbourne (dl) (Entered: 04/29/2003)

04/28/2003 TRANSCRIPT of Non-Jury Trial held on December 3, 2002 Vol. II of II by CSR Tracy Washbourne (dl) (Entered: 04/29/2003)

* * *

05/04/2004 85 MANDATE From USCA – The judgment is Reversed. The case is Remanded to the District Court [72] Notice of Appeal,, filed by Sharon Lynn Atherton, Robert T Murphy, Roger Bloxham, Michael A Clem, Charles A Burris, Andrea L Beaver, Floyd Turner, Minelle L Batson, Mary Y Burnett, Michael L Seymour, Terry L Beaver, Steve Galpin, Richard P Prawdzienski, Whitney L Boutin, Christopher S Powell (Attachments: #1 Attachment Continued) (dl,) (Entered: 05/04/2004)

* * *

05/20/2004 92 MANDATE from USCA – Statement of cost [72] Notice of Appeal,, filed by Sharon Lynn Atherton, Robert T Murphy, Roger Bloxham, Michael A Clem, Charles A Burris, Andrea L Beaver, Floyd Turner, Minelle L Batson, Mary Y Burnett, Michael L Seymour, Terry L Beaver, Steve Galpin, Richard P Prawdzienski, Whitney L Boutin, Christopher S Powell (dl,) (Entered: 05/25/2004)

* * *

06/29/2004 97 JUDGMENT in favor of Plaintiffs against Defendants, consistent with the opinion and judgment of the US Court of Appeals for the 10th Circuit on 4/6/04. Judgment grants 95 Motion to Enter Judgment and Permanent Injunction filed by Plaintiffs. Okla. Stat. Ct. 26, secs. 1-104(A) and 1-104(B)(4) are declared, as applied to the plaintiffs herein, unconstitutional to the extent that they prevent a recognized political party in the State of Oklahoma from permitting voters registered as members of other political parties from voting in the political party's primary election or runoff primary election pursuant to the political party's choice. Defendants are enjoined from enforcing, applying, or implementing Okla. Stat. tit. 26, sec. 1-104(B)(4) to the extent that said election statute would prevent the plaintiffs or any other political party from inviting any registered voter of another political party from voting in the political party's primary election or runoff primary election pursuant to the choice of the political party in question. Effective immediately, the Oklahoma State Election Board must allow any recognized political party or a group of persons seeking to form a recognized political party to notify the Secretary of the Oklahoma State Election Board, pursuant to Okla. Stat. tit. 26, sec. 1-104, as to whether or not the party intends to permit registered voters designated as Independents or members of other political parties to vote in a primary

election or runoff primary election of the party. If the party is recognized and the group of persons seeking recognition of the party notifies the Secretary of the State Election Board of such intention, registered of the party notifies the Secretary of the State Election Board of such intention, registered voters designated as Independents or members of other political parties shall be permitted to vote in any primary election or runoff primary election of the party held prior to January 1 of the following even-numbered year. Defendants' request for a stay of the enforcement or effect of this judgment or of any injunctive-type relief is DENIED. Signed by Judge Stephen P. Friot on 6/29/04. (llg) (Entered: 06/29/2004)

* * *

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

(1) ANDREA L. BEAVER; (2) FLOYD TURNER; (3) MINELLE L. BATSON; (4) MARY Y. BURNETT; (5) MICHAEL L. SEYMOUR; (6) TERRY L. BEAVER; (7) ROBERT T. MURPHY; (8) SHARON LYNN ATHERTON; (9) ROGER BLOXHAM; (10) STEVE GALPIN; (11) RICHARD PRAWDZIENSKI; (12) MICHAEL A. CLEM; (13) WHITNEY I. BOUTIN, JR.; (14) CHRISTOPHER S. POWELL; (15) CHARLES A. BURRIS; AND THE (16) LIBERTARIAN PARTY OF OKLAHOMA a/k/a Libertarian Political Organization;	) Case No. CIV-00-1071-L
Plaintiffs,	
v.	
(1) LANCE WARD, Secretary of the Oklahoma State Election Board; (2) GLO HENLEY, Chairman of the Oklahoma State Election Board; (3) KENNETH MONROE, Vice Chairman of the Oklahoma State Election Board; (4) THOMAS E. PRINCE, Member of the Oklahoma State Election Board; and the (5) OKLAHOMA STATE ELECTION BOARD;	
Defendants.	

AMENDED COMPLAINT

(Filed Sep. 14, 2000)

COME now the Plaintiffs after obtaining leave of Court to file an Amended Complaint pursuant to paragraph 20 of the Scheduling Order of September 5, 2000, and for their cause of action against the Defendants, hereby amend their complaint to allege and state as follows, to-wit:

I.

Plaintiff ANDREA L. BEAVER is a resident of Tulsa County and a registered Democratic voter in Tulsa County, Oklahoma. Plaintiff FLOYD TURNER is a resident of Tulsa County and a registered Democratic voter in Tulsa County, Oklahoma. Plaintiff MINELLE L. BATSON is a resident of Oklahoma County and a registered Democratic voter in Oklahoma County, Oklahoma. Plaintiff MARY Y. BURNETT is a resident of Rogers County, and a registered Republican voter in Rogers County, Oklahoma. Plaintiff MICHAEL L. SEYMOUR is a resident of Tulsa County and a registered Republican voter in Tulsa County, Oklahoma. Plaintiff TERRY L. BEAVER is a resident of Tulsa County and a registered Republican voter in Tulsa County, Oklahoma.

Plaintiff ROBERT T. MURPHY is a resident of Cleveland County, a registered Libertarian voter in Cleveland County, Oklahoma, is a candidate for the Libertarian nominations for United States Reprentative [sic] for the 5th District of Oklahoma, and is the Chair of the Oklahoma Libertarian Party. Plaintiff SHARON LYNN ATHERTON is a resident of Tulsa County and a registered Libertarian voter in Tulsa County, Oklahoma. Plaintiff ROGER BLOXHAM is a resident of Tulsa County, a registered Libertarian voter in Tulsa County, Oklahoma, was a candidate for the Libertarian nomination for Corporation Commissioner in Oklahoma at the Primary Election conducted on August 22, 2000, and is the Libertarian nominee for Corporation Commissioner in the

State of Oklahoma for the General Election to be conducted on November 7, 2000. Plaintiff STEVE GALPIN is a resident of Oklahoma County, a registered Libertarian voter in Oklahoma County, Oklahoma, and is the Libertarian Voter Registration and Ballot Access Coordinator for the State of Oklahoma. Plaintiff RICHARD P. PRAWDZIENSKI is a resident of Oklahoma County, a registered Libertarian voter in Oklahoma County, Oklahoma, and was a candidate for the Libertarian nomination for Corporation Commissioner in Oklahoma at the Primary Election conducted on August 22, 2000. Plaintiff MICHAEL A. CLEM is a resident of Tulsa County, a registered Libertarian voter in Tulsa County, Oklahoma, and is a candidate for the Libertarian nomination for United States Representative from the 1st District of Oklahoma. Plaintiff WHITNEY I. BOUTIN, Jr., is a resident of Cleveland County, a registered Libertarian voter in Cleveland County, Oklahoma, was the leading candidate for the Libertarian nomination for Corporation Commissioner in Oklahoma at the Primary Election conducted on August 22, 2000, but withdrew from said candidacy in order to avoid a Run-off Election because all Oklahoma voters would not [sic] permitted to vote in said Run-off Election and to save taxpayers money which would otherwise be expended on a Run-off Election which would not be conducted in the manner that the Libertarian Party of Oklahoma wished it to be conducted. Plaintiff CHRISTOPHER S. POWELL is a resident of Oklahoma County, a registered Libertarian voter in Oklahoma County, Oklahoma, and is a candidate for the Libertarian nomination for the State House of Representatives in District 100. Plaintiff CHARLES A. BURRIS is a resident of Tulsa County and a registered Libertarian voter in Tulsa County, Oklahoma.

Plaintiff LIBERTARIAN PARTY OF OKLAHOMA, a/k/a Libertarian Political Organization, is currently recognized in the State of Oklahoma as a political party pursuant to OKLA. STAT. tit. 26, § 1-108, but was recognized at the time of the filing of the original Complaint in this action on June 16, 2000, as a political organization pursuant to OKLA. STAT. tit. 26, § 1-109(B), and became recognized as a political party pursuant to OKLA. STAT. tit. 26, § 1-108, on or about June 20, 2000, after the Libertarian Party turned in approximately 99,000 signatures pursuant to OKLA. STAT. tit. 26, § 1-108 on May 31, 2000. Plaintiff Libertarian Party of Oklahoma intends to continue to attain recognition as a political party pursuant to OKLA. STAT. tit. 26, § 1-108 during future Presidential election years in the event the Libertarian Party of Oklahoma reverts back to the status of the Libertarian political organization pursuant to OKLA. STAT. tit. 26, § 1-109(B) after the General Election in Oklahoma on November 7, 2000.

All the above-named individual Plaintiffs are citizens of the State of Oklahoma and the United States of America, registered voters of the State of Oklahoma, and wished to have the right to cast their votes in the Libertarian Primary Election which was held in Oklahoma on August 22, 2000, and in any future Libertarian Primary or Run-off Elections conducted in the State of Oklahoma.

II.

Defendant LANCE WARD is the Secretary of the Oklahoma State Election Board (hereinafter referred to as Defendant Secretary and Defendant Board, respectively, and is responsible for administering the election and voter registration laws of the State of Oklahoma pursuant to

OKLA. STAT. tit. 26, § 2-107. Specifically, the Defendant SECRETARY has supervisory authority over all county election boards, has responsibility to promulgate, repeal or modify such rules or regulations as he deems necessary to facilitate and assist in achieving and maintaining uniformity in the application, operation, and interpretation of the State and Federal election laws and a maximum degree of correctness, impartiality, and efficiency in administration of the election laws, and to act as the chief state election official responsible for coordination of state responsibilities under the National Voter Registration Act of 1993 (42 U.S.C. § 1973gg, *et seq.*).

Defendant GLO HENLEY is the Chairman of the Defendant Board, Defendant KENNETH MONROE is the Vice Chairman of the Defendant Board, and THOMAS E. PRINCE is a member of the Defendant Board.

Defendant BOARD is a state agency and body politic organized under the laws of the State of Oklahoma, viz.: OKLA. STAT. tit. 26, § 2-101, *et seq.*, to operate and perform such duties as are prescribed by law for the purposes of overseeing elections conducted in the State of Oklahoma.

All the aforesaid Defendants have offices in Room B-6, State Capitol Building, Oklahoma City, Oklahoma, 73152.

III.

This is an action for declaratory and injunctive relief. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1343(3), 1343(4), 2201, and 2202, and 42 U.S.C. § 1983. Venue of this Court is invoked pursuant to 28 U.S.C. § 1391. The rights, privileges, and immunities

sought to be declared and redressed are those secured by the First and Fourteenth Amendments to the United States Constitution.

IV.

This proceeding seeks a judgment declaring OKLA. STAT. tit. 26, §§ 1-104(A) and 1-104(B)(4), as applied to the Plaintiffs, unconstitutional in that they violate the First and Fourteenth Amendments of the United States Constitution and 42 U.S.C. § 1983. This proceeding also seeks an injunction, both temporary and permanent, against Defendants SECRETARY and BOARD, and their members above-styled, prohibiting said Defendants from following and enforcing the provisions of OKLA. STAT. tit. 26, §§ 1-104(A) and 1-104(B)(4), as applied to the Plaintiffs herein, to the extent that said statutes would be interpreted as preventing a recognized political party in Oklahoma from opening up its Primary and Run-off Elections to all Oklahoma registered voters regardless of political party affiliation.

V.

The laws in question which were stated in rhetorical paragraph IV above are as follows, to-wit:

OKLA. STAT. tit. 26, § 1-104, Closed primaries – Independent voters

> A. No registered voter shall be permitted to vote in any Primary Election or Runoff election of any political party except the political party of which his registration form shows him to be a member, except as otherwise provided by this section.

* * *

B. 4. A group of persons seeking to form a recognized political party pursuant to the provisions of Section 1-108 of this title shall, upon filing of the petitions seeking recognition of the political party with the Secretary of the State Election Board, notify the Secretary of the State Election Board as to whether or not the party intends to permit registered voters designated as Independents to vote in a Primary Election or Runoff Primary Election of the party. If the party is recognized and the group of persons seeking recognition of the party notifies the Secretary of the State Election Board of such intention, registered voters designated as Independents shall be permitted to vote in any Primary election or Runoff Primary Election of the party held prior to January 1 of the following even-numbered year.

VI.

On the 31st day of May, 2000, the Libertarian Political Organization of Oklahoma turned in a designation to the Secretary of the Oklahoma State Election Board, pursuant to OKLA. STAT. tit. 26, § 1-104(B)(4), stating that Independent voters may vote in the Libertarian Party's Primary in Oklahoma in the year 2000. Further, the Libertarian Political Organization further stated that all other Oklahoma registered voters – whether they were Republican, Democrat, Reform, or any other recognized political party or political organization – may also vote in the Oklahoma Libertarian Primary in the year 2000. The Secretary of the Oklahoma State Election Board accepted said notification as to Independent voters only.

The Libertarian Party of Oklahoma feels that it would be advantageous to it as a political party and important to its members and all voters of Oklahoma if their rights to political association and political speech pursuant to the First and Fourteenth Amendments to the United States Constitution were furthered by opening up the Libertarian Party Primary and Run-off Elections to all Oklahoma voters regardless of political affiliation.

The Libertarian Party of Oklahoma and its members feel that opening up of the Libertarian Party of Oklahoma's Primary and Run-off Elections would help them reach out to Libertarian-oriented voters of other political affiliations, produce a more viable Libertarian candidate for the General Election, create favorable publicity for the Libertarian Party, and encourage further expansion and growth of the Libertarian philosophy. It has also been the experience of most Libertarians that many individuals not formally affiliated with the Libertarian Party share Libertarian views on certain issues so as to support the advancement of common political objectives favored by the Libertarians. Also, the Libertarians have found and believe that there are a number of voters in the State of Oklahoma who are registered in political parties other than the Libertarian Party who wish to vote in the Libertarian Party's Primary and Run-off Elections in the State of Oklahoma in the year 2000, and in future Primary and Run-off Elections to be conducted in the State of Oklahoma on behalf of the Libertarian Party.

That the Libertarian Party of Oklahoma has passed By-laws and resolutions which permit all registered Oklahoma voters – whether they be Republican, Democratic, Reform, Independent, Libertarian, or any other designation – to vote in any Primary or Run-off Election

conducted by the Libertarian Party in any election in the year 2000 or in any future Primary or Run-off Election conducted in the State of Oklahoma for the Libertarian Party.

VII.

In the election year in Oklahoma for the year 2000, the filing period for political party nominations is on July 10, 11, and 12, 2000, while the political party Primary election is held on August 22, 2000, a Runoff Election on September 19, 2000, and the General Election on November 7, 2000. In the election year in Oklahoma for the year 2004, the filing period for political party nominations is on July 12, 13, and 14, 2004, while the political party Primary Election is held on August 24, 2004, a Run-off Election on September 21, 2004, and the General Election on November 2, 2004. If OKLA. STAT. tit. 26, §§ 1-104(A) and 1-104(B)(4) are enforced so as to deny the Libertarian Party of Oklahoma and individual Oklahoma registered voters who are not either Libertarians or Independents the right to vote in the Libertarian Party Primary and Run-off Election in the year 2000 and/or in future Libertarian Party Primary or Run-off Elections in the State of Oklahoma, then the rights to political association and First Amendment free speech of the Libertarian Party of Oklahoma, the individual members of the Libertarian Party of Oklahoma, the Libertarian Party candidates, and those Oklahoma voters who are not either registered as Libertarians or Independents, but who wish to vote in the Oklahoma Libertarian Primary Election or Run-off Election in the year 2000, or in future Oklahoma Primary or Run-off Elections for the Libertarian Party, will be abridged and denied.

VIII.

Defendant SECRETARY, BOARD, and the individual members of Defendant BOARD named herein as Defendants, have and will exercise their authority under color of state law in enforcing the aforesaid state laws in such a manner as to be in an unlawful, discriminatory, capricious, and arbitrary manner, in violation of the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983, in that:

A. By reason of said required action as set forth in rhetorical paragraph VII above by said Defendants, through its named Defendant members and their agents, employees, and servants, the Plaintiffs herein will be denied their rights to actively engage in the exercise of their free speech, right to political association, seek redress of grievances, cast an effective vote, and equal protection and due process of the laws of the United States of America;

B. Said required action as set forth in rhetorical paragraph VII above works to further no constitutional compelling state interest or political purpose for said state election laws, Plaintiffs' fundamental constitutional freedoms are or will be denied and abridged, and the laws in question work in an unequal and discriminatory manner in that they favor the established and entrenched political parties (viz.: Republican Party and Democratic Party).

IX.

Plaintiffs herein will suffer immediate and irreparable harm in the event that the complained of actions set forth in rhetorical paragraph VII and VIII hereinabove are allowed to occur. The effect of the aforesaid complained of actions would be to effectively deny Plaintiffs those rights

enumerated hereinabove in rhetorical paragraph VIII(A). Plaintiffs have no adequate remedy at law for the denial of their rights and the impairment of the constitutional rights, privileges, and immunities enjoyed by a citizen of the United States and the State of Oklahoma, and, unless a temporary injunction and a permanent injunction are granted, Plaintiffs will suffer great and irreparable harm.

WHEREFORE, Plaintiffs demand judgment: -

1. Declaring that the said required actions as set forth in rhetorical paragraph VII above pursuant to OKLA. STAT. tit. 26, §§ 1-104(A) and 1-104(B)(4) are illegal and unconstitutional, particularly as applied to the facts of the case at bar in that they are in violation of the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983;

2. Entering a preliminary and permanent injunction restraining, prohibiting, and enjoining the Defendants to the instant action, their agents, employees, and servants, and all persons in active concert and participation with them, from enforcing, applying, or implementing the aforesaid complained of state election laws as applied to the instant Plaintiffs and all similarly situated individuals who support and wish to vote in Oklahoma in the Libertarian Primary and – if necessary – Run-off Elections in the year 2000 and future Libertarian Primary and Run-off Elections in the State of Oklahoma;

3. Awarding Plaintiffs reasonable costs and expenses in this action including attorney fees pursuant to the Civil Rights Attorney Fees Awards Act of 1976, 42 U.S.C. § 1988; and

4. Granting Plaintiffs such further relief as to which they may be entitled and which the Court may deem just and equitable.

Dated this 13th day of September, 2000.

ANDREA L. BEAVER; FLOYD TURNER; MINELLE L. BATSON, MARY Y. BURNETT; MICHAEL L. SEYMOUR; TERRY L. BEAVER, ROBERT T. MURPHY; SHARON LYNN ATHERTON; ROGER BLOXHAM; STEVE GALPIN; RICHARD P. PRAWDZIENSKI; MICHAEL A. CLEM; WHITNEY L. BOUTIN, JR.; CHRISTOPHER S. POWELL; CHARLES A. BURRIS; LIBERTARIAN PARTY OF OKLHOMA [sic], Plaintiffs

JAMES C. LINGER, OBA#5441
Counsel for Plaintiffs

/s/ James C. Linger
1710 South Boston Avenue
Tulsa, Oklahoma 74119-4810
(918) 585-2797 (918) 583-8283 Facsimile

CERTIFICATE OF MAILING

I hereby certify that on this 13th day of September, 2000, a true and correct copy of the above and foregoing instrument was mailed to Defendants' counsel, WELLON B. POE, JR., ESQ., Assistant Attorney General, 4545 North Lincoln Boulevard, Suite 260, Oklahoma City, Oklahoma 73105.

/s/ James C. Linger
JAMES C. LINGER

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

ANDREA L. BEAVER, et al.,

Plaintiffs,

v. Case No. CIV-00-1071-L

LANCE WARD, Secretary of the
Oklahoma State Election Board, et al.,

Defendants.

ANSWER TO FIRST AMENDED COMPLAINT

(Filed Sep. 19, 2000)

COME NOW the Defendants, by and through Wellon B. Poe, Assistant Attorney General and, in Answer to Plaintiffs' First Amended Complaint, state as follows:

1. These Defendants admit that the Libertarian Party of Oklahoma is currently recognized as a political party pursuant to Oklahoma Statutes. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Section I and therefore deny the same.

2. These Defendants admit the allegations contained in Section II.

3. These Defendants admit this Firs' Amended Complaint is an action for declaratory and injunctive relief as stated in Section III. These Defendants deny that any rights, privileges or immunities of any of the Plaintiffs have been violated by actions of the Defendants.

4. These Defendants admit that the First Amended Complaint seeks a judgment declaring 26 O.S. § 1-104(A)

and § 1-104(B)(4) unconstitutional. These Defendants deny that those statutory provisions are unconstitutional or that Plaintiffs are entitled to any declaratory or injunctive relief as sought in Section IV of the First Amended Complaint.

5. Section V of the First Amended Complaint requires no response from these Defendants.

6. These Defendants admit the allegations contained in the first paragraph of Section VI of the First Amended Complaint. These Defendants deny the remaining allegations of Section VI of the First Amended Complaint.

7. These Defendants admit the allegations contained in Section VII in regards to dates for filing and elections in the State of Oklahoma for 2000. These Defendants deny the remaining allegations contained in Section VII of the First Amended Complaint.

8. These Defendants deny the allegations contained in Section VIII and subsections A and B of the First Amended Complaint.

9. These Defendants deny the allegations contained [sic] Section IX of the First Amended Complaint.

10. These Defendants deny that Plaintiffs are entitled to any declaratory or injunctive relief or attorneys' fees, costs, or any other relief as requested in Plaintiffs' Demand, ¶¶ 1, 2, 3 and 4 of the First Amended Complaint.

11. These Defendants deny any assertion in the First Amended Complaint not specifically addressed elsewhere in this Answer.

AFFIRMATIVE DEFENSES

These Defendants assert the following affirmative defenses:

1. The First Amended Complaint fails to state a claim for any declaratory relief.

2. The First Amended Complaint fails to state a claim for any injunctive relief.

3. The Oklahoma Statutes in question are constitution as written and/or applied.

4. There has been and will be no violation of any of Plaintiffs' First Amendment rights.

5. There has been and will be no violation of any of Plaintiffs' Fourteenth Amendment rights.

6. Plaintiff Libertarian Party of Oklahoma aka Libertarian Political Organization does not have standing to bring this Complaint.

7. The individually named Plaintiffs do not have standing to bring this Complaint.

8. These Defendants specifically reserve the right to add additional defenses as they may become known during the course of this litigation.

WHEREFORE, for premises considered, Defendants pray that Plaintiffs take nothing by way of their First Amended Complaint, that their request for injunctive and declaratory relief be denied and that Defendants be warded reasonable attorneys' fees, costs and any other relief this Court deems just and appropriate.

Respectfully submitted,

ATTORNEY FOR DEFENDANTS

/s/ Wellon B. Poe
WELLON B. POE, OBA # 12440
ASSISTANT ATTORNEYS GENERAL

4545 N. Lincoln, Suite 260
Oklahoma City, OK 73105
(405) 521-4274 Fax (405) 528-1867

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ANDREA L. BEAVER; et al., ... Plaintiffs,	)	
v.	)	Case No. CIV-00-1071-L
LANCE WARD, Secretary of the Oklahoma State Election Board; et al., ... Defendants.	)	

ORDER

(Filed Aug. 20, 2001)

NOW, on this 20th day of August, 2001, this matter came on to be heard on Plaintiffs' Suggestion on Record for Substitution of Party Defendant, and the Court, after considering said Suggestion filed herein, is of the opinion that the following Order should issue.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that said Suggestion be, and the same is hereby granted, and Michael Clingman, Secretary of the Oklahoma State Election Board, is substituted as party Defendant in place of Lance Ward, Secretary of the Oklahoma State Election Board.

It is so ordered this 20th day of August, 2001.

/s/ Tim Leonard
TIM LEONARD
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

No. 5:00-cv-01071

[Caption Omitted In Printing]

AFFIDAVIT OF RICHARD WINGER

City and County of San Francisco	)	PLAINTIFFS' TRIAL EXHIBIT NO. 3
State of California	)	

I, Richard Winger, being of sound mind and body and legal age, do hereby swear and affirm the following, to be used in *Beaver v Clingman*, case number CIV-00-1071-L, in the Western District of Oklahoma. I make this Affidavit from first hand personal knowledge, except as indicated otherwise hereinbelow:

1) I am a resident of the State of California.

2) I graduated from the University of California at Berkeley in 1966 with a BA degree in political science. Since 1985 I have been the publisher of *Ballot Access News*, a non-partisan newsletter that reports on developments in ballot access law. I am on the editorial board of *Election Law Journal*, established 2001, edited by Daniel H. Lowenstein of the UCLA School of Law, and Rick Hasen, Loyola Law School, Los Angeles, and published by Mary Ann Liebert, Inc., of Larchmont, New York.

3) My articles about ballot access have been published as chapters in three books: (1) *Multiparty Politics in America*, edited by Paul S. Herrnson (1997: Rowman & Littlefield, Lanham, Md.); *The Encyclopedia of Third Parties in America*, edited by Immanuel Ness and James

Ciment (2000: M.E. Sharpe, Inc., Armonk, N.Y.); (3) *The New Populist Reader*, edited by Karl Trautman (1997): Praeger, Westport, Ct.).

4) Other articles of mine have been published in the *Wall Street Journal, Cleveland State Law Review, American Review of Politics, Oklahoma Politics, Chronicles* Magazine, *The Long Term View, Price Costco Connection,* and *California Journal.* I have appeared on national broadcasts of NBC, ABC, CNN National Public Radio, and Pacifica Radio, speaking on ballot access.

5) I have testified in ballot access lawsuits in person in Alaska, Arkansas, Florida, Oklahoma, Oregon, Pennsylvania, Texas and West Virginia and by affidavit in Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Iowa, Kansas, Kentucky, Maine, Maryland, Nevada, North Carolina, Oklahoma, Texas and Wyoming. I have been qualified as an expert witness in the areas of ballot access by federal courts in California, Arkansas, Oklahoma and West Virginia. The cases were *Citizens to Establish a Reform Party in Arkansas* v *Priest*, 970 F.Supp. 690 (E.D.Ar. 1996), *California Democratic Party* v *Jones*, 984 F.Supp. 1288 (E.D.Ca. 1997), *Fishbeck* v *Hechler*, 85 F.3d 162 (4th cir. 1996) and *Atherton* v *Ward*, 22 F.Supp. 2d 1265 (W.D. Ok. 1998).

Differences between Oklahoma and California Environments for Minor Parties

6) Minor parties in Oklahoma face a very different legal environment than minor parties in California. Consequently, they have different strategies and needs. It is rational that the Libertarian Party of Oklahoma seeks to

open its primary to all voters; and it is also rational that the Libertarian Party of California closes its primary to all but its own registrants. California election law nurtures minor parties. At the same time, California election law makes it very difficult for independent candidates to get on the ballot. Oklahoma law is the opposite. Oklahoma election law makes it virtually impossible for minor parties to thrive, but Oklahoma election law makes it very easy for independent candidates (for office other than president) to get on the November ballot. As a result, minor parties in California are relatively successful and have a fair amount of prestige, and are in danger of being infiltrated by opportunistic persons who merely want to use the party to enable themselves to win a place on the general election ballot. There is no such danger for minor parties in Oklahoma; such opportunistic persons use the lenient independent candidate petition procedures.

7) The following paragraphs deal with comparisons between Oklahoma and California for the period 1976 through the present. 1976 was chosen because the most important Oklahoma ballot access laws for minor parties went into effect in 1975, and they haven't substantially changed since. Also, the California ballot access laws have been unchanged since 1976. California and Oklahoma are similar, in requiring all qualified political parties to nominate by primary. California and Oklahoma are also similar, in providing that voters register as members of parties (or as independents) when they fill out a voter registration form.

The California Legal Environment for Minor Parties

8) California nurtures minor parties by making it easy for them to remain on the ballot, after they first qualify. A party remains qualified as long as it keeps its registration above one-fifteenth of 1% (California election law § 5101), and as long as it polls 2% of the vote for any statewide office in a mid-term gubernatorial year (§ 5101a). California elects 7 statewide state partisan constitutional officers in mid-term years. History shows that it is easy for a minor party to poll at least 2% of the vote for at least one of these offices. And even if a minor party should fail the 2% vote test, it is restored to the ballot if it can get its registration up to 1% of the last gubernatorial election in any registration tally after the election. In the years since 1975, there have been 52 instances at which a minor party appeared on the ballot in a California regularly-scheduled general election (2 minor parties in each of the election years 1976 through 1978, three minor parties in each election year 1980 through 1990, four minor parties in each election year 1992 through 1994, six minor parties in each election year 1996-1998, and five minor parties 2000-2002). Out of those 52 instances, there is only one instance at which a minor party ever lost its spot on the ballot (Peace & Freedom Party lost its place on the ballot in 1998). This means that when a minor party faces a California election, the odds are 98% that it will retain its place on the ballot.

9) The consequences of California's nurturing law, are that the minor parties are fairly strong and prestigious. Some of California's largest cities, and many of its medium-sized cities, have elected minor parties members to important public office. Currently both the Libertarian Party and the Green Party have registered members who

are County Supervisors (in Calaveras and San Francisco Counties). Each of these two minor parties has over 100 registered members who hold an elective city or other local office. The Green Party elected a state legislator in 1999, and the Libertarian Party polled 37% in a 1991 special legislative election. At the latest registration tally (February 2001), California's five qualified minor parties had 680,442 registered members, which was 4.4% of the total number of registered voters (that number doesn't include the members of unqualified minor parties, or the number of independents).

10) At the same time California give minor parties security and continuity, it makes it very difficult for independent candidates to get on the November ballot. Independent candidates for statewide office must collect signatures of 1% of the number of registered voters (approximately 150,000 signatures). Independent candidates for district office must collect signatures of 3% of the number of registered voters (more than 8,000 signatures in a typical US House district). These are difficult petition requirements; only 4 independent candidates for the US House have qualified in California since 1975.

11) The combination of California's making it easy for minor parties to thrive, but difficult for independent candidates to get on the ballot as independents, causes a danger for minor parties. California law creates a situation in which individuals who have no sympathy for the ideas of a particular minor party, but who desire to run for partisan office outside the major parties, are tempted to join minor parties for opportunistic reasons, just in hopes that they can win a minor party nomination, and in this way appear on the November ballot. This is often perceived as an easier task, than completing the onerous

independent candidate petition. Since California's minor parties are relatively large organizations, and frequently have contested primaries, California's minor parties do everything they can to guarantee that only candidates who represent the party's ideas can win the nomination. The parties have no power to prevent any person from registering as a member of that party. Furthermore, any person who has been a member of the party for a certain length of time can win a place on that party's primary ballot, by obtaining 40 signatures of party members and paying a filing fee (or, 65 signatures if the office is statewide). Thus, opportunistic outsiders can easily win a place on a minor party's primary. The only defense California minor parties have against such opportunistic outsiders, is for the parties to run loyal members for as many partisan offices as possible, and also to ensure that only loyal party members choose the nominees. For this reason, neither the Libertarian and Green Parties of California allow registered independents to vote in their primaries (under California law, parties are free to invite registered independents into their primaries, if they wish, and the two major parties do invite independents into their primaries).

The Oklahoma Legal Environment for Minor Parties

12) Oklahoma election law makes it virtually impossible for a minor party to thrive. Since 1975, a party must poll 10% for president in every presidential election year, and 10% for Governor in every gubernatorial mid-term year, in order to remain on the ballot. Minor parties cannot meet these requirements. No minor party has managed to poll as much as 10% of the vote for president, in the nation, for even two elections in a row, in U.S. history. And no minor party has ever polled as much as 10% of the vote for

Governor of Oklahoma, even once, since 1914. There are ten instances at which a minor party placed nominees on the Oklahoma ballot, under its party name, since 1975. Sometimes this was by a party qualifying as a political party; other times it was by an unqualified party, qualifying only its presidential candidate, under a special procedure governing presidential elections. Out of these ten instances, only once did the party poll 10% for the necessary office (the Reform Party in 1996). Oklahoma's 10% success rate for party survival contrasts markedly with the 98% California rate at which parties remain on the ballot. Furthermore, the Oklahoma petition to re-qualify a party, 5% of the last vote cast for president or governor (whichever is more recent) is so severe, such a petition has never been completed in Oklahoma in a mid-term year. For 2002, Oklahoma requires 61,712 signatures for this purpose. Yet no party in Oklahoma has ever managed to overcome a petition hurdle greater than 49,751 signatures (that was the requirement for getting a party on the ballot in 1996).

13) A consequence of Oklahoma's ballot access law is that minor parties in Oklahoma are extremely weak. Even though Libertarians have been elected to public office in a majority of states, no Libertarian, or member of any other minor party, has been elected to any Oklahoma public office since before 1975. In Oklahoma, no minor party since before 1975 has ever had more than two years and five months of continuous legal recognition. Because minor parties in Oklahoma do not enjoy stability of legal recognition, they have small memberships. For instance, in November 2000, there were only 703 registered Libertarians, and only 252 registered members of the Reform Party, in Oklahoma. By contrast, in Kansas, where the libertarian Party has enjoyed ten years of continuous

recognition and where the Reform Party has had five years of continuous recognition, in November 2000 there were 9,976 registered Libertarians and 1,888 Reform registrants, even though Kansas has a smaller population than Oklahoma.

14) Minor parties in Oklahoma, even when they do manage to be recognized, need not fear being invaded by opportunistic candidates (candidates who do not share the party ideology, but who join the party just so they can get on the ballot) because Oklahoma has extremely easy requirements for independent candidates (for office other than president) to get on the ballot. Such candidates need not submit any petition; they only pay the same filing fee that all candidates for the same office pay. Consequently, minor parties in Oklahoma do not worry about "strangers" running in their primaries. Therefore, since no one but *bona fide* party members ever choose to run in minor party primaries in Oklahoma, there is no disadvantage whatsoever, for minor parties to invite all registered voters to participate in their primaries. The Libertarian Party in Oklahoma, because it faces such a hostile legal environment, needs some means to attract voter interest. The party's idea of inviting all registered voters into its primary, is one such method. There is no logical contradiction between the Oklahoma Libertarian strategy, and the California Libertarian strategy, because the two parties face such different circumstances.

SIGNED /s/ Richard Winger

Signed this 5 day of October, 2001. Witnessed by _____, Notary Public. My Commission expires _____

CALIFORNIA ALL-PURPOSE ACKNOWLEDGEMENT

State of California
County of San Francisco } ss.

On 10-5-01, (Date) before me, Roberta J. Grover, (Name and Title of Officer (e.g., "Jane Doe, Notary Public")) personally appeared Richard Wagner, (Name(s) of Signer(s)).

☐ personally known to me
☒ proved to me on the basis of satisfactory evidence

to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

[SEAL]

ROBERTA J. GROVER
Commission #1306291
Notary Public – California
San Francisco County
My Comm. Expires
Jan. 25, 2005

Roberta J. Grover
Signature of Notary Public

Place Notary Seal Above

OPTIONAL

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document

Description of Attached Document

Title or Type of Document: Affidavit Re Richard Wagner

Document Date: 10-5-01 Number of Pages: 6

Signer(s) Other Than Named Above: _____

Capacity(ies) Claimed by Signer

Signer's Name: _____

☒ Individual
☐ Corporate Officer – Title(s): _____
☐ Partner – ☐ Limited ☐ General
☐ Attorney in Fact
☐ Trustee
☐ Guardian or Conservator
☐ Other: _____

Signer is Representing: _____

RIGHT THUMBPRINT OF SIGNER
top of thumb here

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

No. 5:00-cv-01071

[Caption Omitted In Printing]

Ballot Access News

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James C. Linger
fax 918-583-8283

March 14, 2002

Dear Jim,

In Rhode Island, the state does not tally the number of registered members in any particular party. However, this information is available from the Town Clerks. Rhode Island has 39 towns. I communicated with each Town Clerk to get these complete state registration totals:

Democratic	236,002
Republican	62,191
Cool Moose	1,010
Green	240
indp. and other	345,321
TOTAL	644,764

In Rhode Island, a registered independent may file to run in a partisan primary. But anyone who does so will have his or her registration automatically changed, to show membership in that party. In Alaska, no one may run in a partisan primary unless that person is a registered member of the party, on the day the person files to run in that primary.

A new book, *Voting at the Political Fault Line*, was published last month by the University of California Press. The subtitle is "California's Experiment with the Blanket Primary". The authors are all political scientists. The editors are Bruce E. Cain and Elisabeth R. Gerber. One of the chapters in the book, by Elisabeth Gerber, has definitions of "closed primary", "open primary", "blanket primary" and "semiclosed primary". They are:

Closed primary: "Under closed primaries, participation in the primary is limited to registered members of that party."

Blanket primary: "Participation is extended to all registered voters, including partisans, independents, and members of other parties."

Open primary: "Participation is open to all registered voters, but each party has a separate ballot, and voters are restricted to participating in a single party's nominations in a given election."

Semiclosed primary: "an intermediate form that allows independents and/or new voters to participate but not members of other parties."

These definitions are on page 193 and 211.

Sincerely yours,

/s/ Richard Winger

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

No. 5:00-cv-01071 PLAINTIFFS' TRIAL EXHIBIT

[Caption Omitted In Printing] NO. 4

SUPPLEMENTAL REPORT OF RICHARD WINGER

This supplemental report is to be used as an update of my affidavit in *Beaver v. Clingman*, case number CIV-00-1071-L in the Western District of Oklahoma.

Opinion one: the California election law concerning minor political parties is supportive of those parties (paragraph 8 of my affidavit). The basis for this opinion is the history of all six of the minor parties that have been qualified for the California ballot for the period of 1976-2002 (in particular, the history of their ability to remain on the ballot without the need to re-qualify). I have copies of a ballot from all California elections for this period, as well as official election returns from California, and copies of official registration data from California. Also I have been in close touch with leaders of all minor political parties in California for this entire period, and I have also been in close touch with officials of the Elections Division of the California Secretary of State's office. I am aware of the various election law issues that affected these California parties for this entire period.

Opinion two: California minor parties 1976-2002 have been relatively successful (paragraph 9 of my affidavit). The bases for this opinion include my election records, as described above; my collection of minor party publications; my own compiliation [sic] of minor party candidates and whether they were elected or not; and my acquaintence [sic] with other individuals in California minor parties who also keep records on minor party election victories.

Opinion three: California discourages independent candidates (paragraph 10 of my affidavit). The bases for this opinion are the election records described above, and my history of having been in close contact with the campaign organizations of all the independent candidates who ever seriously attempted to qualify in California, and the legal briefs and decisions of all ballot access lawsuits filed by statewide independent candidates between 1976 and 2002.

Opinion four: in California, the combination of tolerant ballot access laws for minor parties, combined with strict ballot access laws for independent candidates, creates an incentive for independent candidates to opportunistically join minor parties, just to hope to gain a spot on the general election ballot (paragraph 11 of my affidavit). The basis for this opinion is my awareness of minor party election activity in California. I have this awareness by having read the publications of all minor parties on the California ballot 1976-2002, and by having been in continuous communication with activists and leaders in each of these minor parties.

Opinion five: Oklahoma election law makes it virtually impossible for a minor party to enjoy stability in relation to being on the ballot (paragraph 12 of my affidavit). The basis for this opinion is my awareness of Oklahoma ballot access requirements, and how they have worked in practice. I have this awareness by knowing the history of the Oklahoma ballot access laws, by my collection of Oklahoma election returns, and by my continuous communication with the national leaders and activists of all the minor parties that have seriously tried to qualify for the Oklahoma ballot 1976-2002.

Opinion six: minor parties in Oklahoma are not successful (paragraph 13 of my affidavit). The bases for this opinion are my continuous reading of minor party publications, my research into petition requirements of all the states and when and by whom they have been used, my collection of Oklahoma election returns, and my continuous communication with leaders of minor parties who have been organized in Oklahoma.

Opinion seven: minor parties in Oklahoma, when they do manage to be recognized, need not fear being invaded by opportunistic candidates because Oklahoma has extremely easy requirements for independent candidates (for office other than president) to get on the ballot (paragraph 14 of my affidavit). The basis for this opinion is my awareness of the Oklahoma ballot access laws for independent candidates, and my awareness of the number of independent candidates who have appeared on the Oklahoma general election ballot for statewide office, and my election returns and general election ballots from Oklahoma. Also, of course, this opinion follows logically from the previous opinions.

The attached Curriculae Vitae contains a list of publications in the preceding ten year (other than my own newsletter, Ballot Access News, which is 17 years old). The attachment also includes a list of other cases in which I have testified as an expert at trial or by deposition. I will not be compensated for my study or testimony.

SIGNED /s/ Richard Winger 4 April 2002

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

No. 5:00-cv-01071 DEFENDANTS' TRIAL EXHIBIT
[Caption Omitted In Printing] NO. 8

24 May 2002

Effect of Allowing Republicans and Democrats to Vote in the Oklahoma Libertarian Primary

R. Darcy[1]

This report uses Oklahoma's experience in the August 22, 2000 Primary and November 2, 2000 General Election to examine the impact on the Libertarian Party nominations of allowing independents to vote in their primary; the impact on independent voter behavior of being offered a Libertarian primary ballot; and the effect on Republicans and Democrats and their primaries should registered Republicans and Democrats be offered the option of taking a Libertarian primary ballot. I also comment on the deposition of Richard Winger dated 5 October 2001. I begin with a brief outline of primary election regulation in Oklahoma.

Oklahoma Primary Elections

Abuse in the control over political party control resulted in California passing the first primary law in 1866. "The immediate occasion for the passage of the California law was the desperate struggle between the 'long hair' and

[1] R. Darcy is Regents Professor of Political Science and Statistics, Oklahoma State University. This Report was prepared in connection with Beaver v. Clingman, et al. CIV-00-1071-L U.S., District Court for the Western District of Oklahoma. CONTACT: bdarcy@okstate.edu

'short hair' factions of the Union party. This contest was accompanied by scenes of great violence, disorder, and glaring fraud, especially in San Francisco and Sacramento."[2] California's was an *optional primary* a political party could request. Wisconsin and Oregon adopted *mandatory primaries* in 1904.[3] These 1904 statutes shifted political parties from private organizations to organizations subject to state regulation.

Oklahoma Territory enacted a primary law in 1905. This law provided for an *optional primary* election if a political party requested it. The statute also provided for a *closed primary* to all but members of the party requesting the primary election.

> "That whenever the Central Committee of any political party in the Territory of Oklahoma, or any district or county or municipality therein shall decide to nominate by primary election any candidate or candidates for any offices, or elect any delegate or delegates to any political or constitutional convention, such Central Committee shall cause a notice thereof to be published for a period of not less than thirty (30) days next proceeding said primary election in some newspaper authorized by law to publish legal notices in the county or counties in which such primary election is to be held, or by posting a notice of such primary election in each precinct of the county, if

[2] Charles Edward Merriam and Louise Overacker. 1928. *Primary Elections* (Chicago: University of Chicago Press): 8; See also Ernst Christopher Meyer. 1902. *Nominating Systems: Direct Primaries versus Conventions in the United States* (Madison, Wisconsin: Meyer): 193-204.

[3] Edward McChesney Sait. 1939. *American Parties and Elections* Revised Edition (New York: Appleton-Century): 347.

there be no such newspaper published in said county."[4]

"In all cities or districts where registration is now or shall hereafter be by law required for general elections, no person shall be entitled to vote at the primary election unless registered for the last preceding election, or shall have registered after such preceding election and prior to such primary election.

It shall be the duty of the City Clerk of all cities of the first class in Oklahoma Territory to keep his office open from nine o'clock A.M., until six o'clock P.M., on the first Monday and Tuesday thereafter, and on the second Monday and Tuesday thereafter of the month next preceding the month in which the primary election shall be held for the purpose of registering the legal voters of said city."[5]

"If any person offering to vote is challenged as unqualified, one of the judges shall tender to him the oath provided by statute for general elections, and propound the question as in said statute provided, and if the vote is challenged on the ground that the voter does not belong to the political party whose ticket he is attempting to vote, they shall propound to him the following questions, to-wit:

[4] *Territory of Oklahoma Session Laws of 1905.* 1905 (Guthrie, Oklahoma: The State Capitol Company):245 Chapter 17 Article 2 Section I.

[5] *Territory of Oklahoma Session Laws of 1905.* 1905 (Guthrie, Oklahoma: The State Capitol Company):246 Chapter 17 Article 2 Sections 4-5.

'With which political party did you affiliate during the last general election?'

'With which political party do you intend to affiliate in the ensuing election?'

And after answering said questions, the challenge be not withdrawn, the judge shall require him to subscribe to the following oath.

'I do solemnly swear (or affirm) that I am a citizen of the United States, have been an actual, bonifide resident of the Territory of Oklahoma thirty days next preceding this election, and have been an actual resident of this precinct for the last thirty days, and have not yet voted at this election, and that I will be eligible to register and vote in the next election for which candidates are now being nominated. I further swear (or affirm) that I am a member of the. . . . party and intend to affiliate with that party at the coming election.'

'(Signed). . . . '

And any person, who shall refuse to subscribe to such oath shall not be entitled to vote at such primary election. The judges of such primary election are hereby authorized and empowered to administer such oath, and any person convicted of falsely swearing under such oath, shall be deemed guilty of a felony, and be punished as provided by statute for perjury."[6]

[6] *Territory of Oklahoma Session Laws of 1905.* 1905 (Guthrie, Oklahoma: The State Capitol Company):248-249 Chapter 17 Article 2 Section 13.

The 1906 Oklahoma Constitution did provide for the legislature creating a voter registration system and *mandatory primary* elections.

> "The Legislature shall enact laws providing for a mandatory primary system, which shall provide for the nomination of all candidates in all elections for State, district, county and municipal officers, for all political parties, including United States Senators: Provided, However, this provision shall not exclude the right of the people to place on the ballot by petition any non-partisan candidate."[7]

> " . . . the Legislature . . . may, when necessary, provide by law for the registration of electors throughout the State or in any incorporated city or town thereof, and, when it is so provided, no person shall vote at any election unless he shall have registered according to law."[8]

The 1907-8 legislature created voter registration *by political party* and set up a system of primaries. The registration was closed the Saturday before the Tuesday primary election. A primary voter could request the ballot of any political party, hence, it can be argued the legislature created an *open primary*.

> "It shall be the duty of the state election board to have prepared and printed for each city, at the expense of the State, proper registration certificate books and blank forms . . . The certificate

[7] *The Constitution of the State of Oklahoma*. 1906. (Oklahoma City, Oklahoma: Warden Printing Company):9-10 Article III Section 5.

[8] *The Constitution of the State of Oklahoma*. 1906. (Oklahoma City, Oklahoma: Warden Printing Company):10 Article III Section 6.

> above provided for shall be in form as follows, to-wit:
> Precinct No. ___ of ___ Ward ___ County ___This is to certify that ___ a person known me, has this day presented himself for registration as an elector in this precinct; that before issuing this certificate I require such person to answer such questions as propounded to him. He says that his name is as above written; that he resides in this precinct, at No. ___ street; he says his post office address is ___; that the color of his hair is ___, his eyes ___, his complexion ___ and politically he is a ___; that he refers to ___ as an owner of real estate who he says knows that he is entitled to vote in this Precinct."[9]

> "It shall be the duty of the election Inspector for each Precinct . . . beginning with the first day of July preceding each biennial primary election and continuing (Sundays excepted) until the hour of nine o'clock p.m. on the last Saturday night of said month of July, to keep open the Precinct registration book in his care as hereinafter provided, for the registration of any electors residing within such precinct and entitled to registration thereunder."[10]

> "Each voter shall designate which ticket he desires to vote and upon request, the election inspector shall deliver to the voter the ticket called

[9] *State of Oklahoma Session Laws of 1907-1908*. 1908 (Guthrie, Oklahoma: Oklahoma Printing Company):353-4; Samuel H. Harris, Jean P. Day and Clinton Orrin Bunn. 1912. *Revised Laws of Oklahoma 1910* Volume I (St. Paul, Minnesota: Pioneer).787.

[10] *State of Oklahoma Session Laws of 1907-1908*. 1908 (Guthrie, Oklahoma: Oklahoma Printing Company):352. N.B. The Primary was then scheduled for the first Tuesday in August – three days later.

> for. When the voter has made out his ballot he shall fold the same and hand it back to the inspector and in the presence of the voter the inspector shall deposit the ballot in the ballot box."[11]

In practice at least some election inspectors refused to allow anyone but registered or bona fide party members vote in party primaries. Such was the case for the August 2, 1910 Democratic primary in Oklahoma County. A criminal case developed when one inspector refused a Democratic Party primary ballot to someone who asked for it but was not a registered Democrat nor was he, in the opinion of the inspector, a bona fide Democrat. The Criminal Court of Appeals, acting as a Supreme Court, unanimously ruled in 1912 that Oklahoma's primary election law intended to exclude non-party members from voting in party primaries.

> "Upon careful consideration, we are of opinion that the constitutional provisions contemplate that only electors who are members of political parties shall participate in the primary election for the selection of candidates for the respective parties, and then vote only the ballot of the party of which they are a member, and that non-partisan electors having no party affiliations are relegated to their right to participate in the nomination of candidates for elective office by petition

[11] *State of Oklahoma Session Laws of 1907-1908.* 1908 (Guthrie, Oklahoma: Oklahoma Printing Company):361; Samuel H. Harris. Jean P. Day and Clinton Orrin Bunn. 1912. *Revised Laws of Oklahoma 1910* Volume I (St. Paul, Minnesota: Pioneer):746.

> in the manner provided for by the primary election law."[12]

The 1913 legislature, by restricting primary voters to the party with which they are registered or to which they are affiliated; ended whatever ambiguity remained. Oklahoma had a *closed primary.*

> "All persons who are qualified electors in this state or who may become such at the first election following such primary, may vote in any primary election; provided, that no person shall assist the nomination of more than one political party. Provided, every person who is known to be a member of any political party seeking to make nominations at said election, the election officers shall permit each elector to assist in the nomination of candidates for such party. Any elector not known to the judges, or known by them to have previously affiliated with some party other than that in which he now desires to participate in the selection of candidates, or whom may be challenged, as to party affiliations, shall be permitted to vote with such party only upon taking an oath that he is in good faith a member of the political party whose candidates he now seeks to assist in nominating, and with which he may be registered, or that it is his intention to support the nominees of the party in which he desires to participate at the coming regular election."[13]

[12] Ex parte Wilson, July 29, 1912. *The Pacific Reporter* volume 125 (St. Paul;, Minnesota; West):744.

[13] Elmer V. Jessee. 1916. *Primary and General Election Laws of the State of Oklahoma* (Oklahoma City, Oklahoma: State Election Board):10-11.

The 1916 legislature required change in party registration to be accomplished 90 days prior to the primary and made clear that persons were to vote only in the primaries of parties for which they were registered, although exceptions were provided for.

> "no change in registration shall be granted of change in politics unless application therefor be made at least ninety days before the next succeeding general primary election."[14]

> "No elector shall, at any primary election held in this State, vote the ballot of any political party of which he is not a member, or which he does not affiliate, and at any such primary election any elector may be challenged on that ground, and when so challenged no such elector shall be permitted to vote at any such primary election unless and until he shall first subscribe and swear to an oath that he is a member of, and does affiliate with, the political party in whose primary he seeks to vote."[15]

The 1913 closed primary system remained in effect through 1987. Consider, for example, the 1974 statutes.

> "No registered voter shall be permitted to vote in any Primary Election or Runoff Primary Election of any political party except the political party of

[14] *State of Oklahoma Session Laws of 1916.* 1916 (Guthrie, Oklahoma: Co-Operative Publishing Company): 41-42.

[15] *State of Oklahoma Session Laws of 1916.* 1916 (Guthrie, Oklahoma: Co-Operative Publishing Company): 46-47.

> which his registration form shows him to be a member."[16]

The 1987 legislature allowed political parties to permit registered independents to vote in primaries or runoff primaries in apparent response to a U.S. Supreme Court decision dealing with Connecticut's similar primary system.[17] This is the current statute.

> "No registered voter shall be permitted to vote in any Primary Election or Runoff Primary Election of any political party except the political party of which his registration form shows him to be a member, except . . . A recognized political party may permit registered voters designated as Independents . . . to vote in a Primary Election or Runoff Primary Election of the party."[18]

While there may be dispute over the meaning of the primary law passed by the 1907-8 legislature, strong argument can be made that Oklahoma has had a closed primary beginning in 1905 and continuing through 1987 when political parties, in response to a court decision, were permitted to allow independents to participate in the selection of their candidates.

[16] *Oklahoma Statutes 1981* Volume 2, 1981. (St. Paul, Minnesota: West):2503.

[17] *Tashjian v. Republican Party of Connecticut* 479 U.S. 208 (1986). Connecticut, like Oklahoma, had a closed primary. The Republicans wished to allow independents to vote in their primary.

[18] *Oklahoma Session Laws 1987.* 1987. (St. Paul, Minnesota: West):283-284; *Oklahoma Statutes 2001* Volume 3. 2001 (St. Paul, Minnesota: West):4224.

Effect on Libertarian Primary

The Libertarian Party permitted independent voters to vote in their August 22, 2000 primary. The only Libertarian contest was for Corporation Commissioner. There were 430 registered Libertarians.[19] The number of valid votes cast in the Libertarian primary was 2049.[20] There were also a number of under and over votes[21] making the total number of individuals taking Libertarian ballots greater than 2049. The primary election was relatively close, Boutin was 166 votes short of the majority needed to avoid a runoff; Prawdzienski was within 115 votes of taking second place, and a runoff position, from Bloxham. Assuming the 430 registered Libertarians all voted, they were swamped by a minimum of 1619 independents able to determine the outcome even if all Libertarians had agreed on a candidate. The effect of allowing independents to vote in a Libertarian primary was to make the independent vote decisive in the outcome.

Effect on The Independent Voter

What was the effect of making available Libertarian primary ballots on independent voters? On August 22, 2000 there was no statewide Republican, Democratic, or Reform primary. The only measure, which all voters could

[19] Author calculation from Trial Brief of Defendants 5 December 2001 page 4; 2049 votes cast, 1619 independents, therefore (2049 - 1619 =) 430 registered Libertarians August 22, 2000.

[20] *Election Results and Statistics 2000* (Oklahoma City: State Election Board, 2000):37.

[21] An under vote is when someone does not cast a valid vote in a contest. An over vote is when someone votes for more candidates than is permitted in a contest.

vote, was State Question 691 affecting vehicle registration fees and taxes. There were a number of legislative and United States House of Representatives primaries, however. Statewide it is impossible to determine how many voters in the primary were Republicans, Democrats, Libertarians, Reform, or independent. This is because there were precincts in which only the Libertarian primary and State Question 691 were being voted on. In those precincts no Republican, Democrat, or Reform ballots would be distributed and counted making an accurate count of participating Republican, Democrats and Reform party members impossible.[22]

There were Republican and Democratic primaries for U.S. House of Representatives in Districts 1 and 2, however.[23] Sixteen Oklahoma counties, contained wholly within one or the other of districts 1 or 2, had Republican and Democratic primaries in addition to the Libertarian. The independent turnout and the percent of independents voting who accepted a Libertarian ballot can be estimated in these sixteen counties.

The first problem is the number of voters registered to each political party. The State Election Board had the total number of registered voters as of August 22, 2000 but not the number of registered to each party at that date. I

[22] Separate Republican (yellow), Democratic (green), Libertarian (beige) and nonpartisan (white) ballots were used for all voting but counting machines did not distinguish them in vote tallies.

[23] Republicans also contested district 6 and Democrats also districts 4 and 5. There were no Reform Party Primaries. This analysis lumps the 78 registered Reform Party members (as of November 1) with the 63,785 independents. While the independents could vote n [sic] the Libertarian Primary, the Reform Party members could not.

used published registration as of November 1, 2000. This was about five percent over the August 22 figures in the sixteen counties of interest here. Using the November 1, 2000 Libertarian registration will overestimate the number of Libertarians by about seventy-five percent. The number of registered Libertarians is so small, however, and the number of independents voting in the Libertarian primary so large, this will not make a difference.

Each voter in the August 22, 2000 primary was handed a ballot with State Question 691. This totaled 190,906 in the sixteen counties of interest here. Each Democratic and Republican voter was given a ballot with their primaries, these totaled 186,112. Some were spoiled, undervoted (no vote cast) or overvoted (too many votes cast). Most registered a valid vote. Each registered Libertarian, if they all voted, a maximum of 251,[24] was given a libertarian primary ballot and, in addition, independents were offered one, in lieu of a nonpartisan ballot, for a total of 735 Libertarian ballots. If we assume all the registered Libertarians, as of 1 November 2000, voted then the number of independents, overall, that voted in the sixteen counties is:

SQ691 vote – (Democratic & Republican + Libertarian) = 190,906 - (186,112 + 251) = 4,543. The number of independents taking Libertarian ballots is the number of Libertarian ballots issued (735) minus the number of registered Libertarians (251) or 484. This is 10.65 percent of the independents voting ([485 ÷ 4543] x 100 = 10.65). If we assume no Libertarians voted the number of independents voting increases by 251 to 4,794 and the independents

[24] As of November 1, 2000.

voting in the Libertarian primary is 735 or 15.33 percent of independents voting ([735 ÷ 4543] x 100 = 15.33).

The true overall percent of independents taking Libertarian ballots is between 10.65 and 15.33 as some Libertarians voted but the number of available registered Libertarians in August was less then the number available in November. Under the assumption all Libertarians voted the percent of voting independents taking Libertarian ballots varied from 3.68 percent (Tulsa) to 41.67 percent (Okfuskee). Under the assumption of no Libertarian voting the percent of voting independents taking Libertarian ballots varied from 6.15 percent (Craig) to 41.67 percent (Okfuskee).

Table 1. Estimate of independents taking Libertarian ballot August 22, 2000 Oklahoma Primary in 16 counties

	Adair	Craig	Cherokee	Creek	Delaware	Haskell	McIntosh	Mayes	Muskogee
Registered									
Democrat	8234	7273	18720	22935	15602	8895	11991	15141	33270
Republican	4091	2110	6171	14309	7818	545	1922	6418	9422
Independent	818	566	2556	3344	2178	252	832	1568	4389
Libertarian	0	1	7	13	4	0	1	4	2
Reform	0	0	4	5	4	1	0	0	0
Total (01 11)	13143	9950	27458	40606	25606	9693	14746	23131	47083
Total (22 08)	*12768*	*9612*	*26266*	*38993*	*24100*	*9420*	*14383*	*22261*	*45782*
% increase	*2.94*	*3.52*	*4.54*	*4.14*	*6.25*	*2.90*	*2.52*	*3.91*	*2.84*
Vote									
Democrat	2773	3225	7585	6896	5971	3883	5118	5885	12027
Republican	886	651	1651	4112	2227	164	558	2034	2968
Libertarian	11	4	27	29	41	15	14	29	66
SQ691	3715	3941	9465	11258	8387	4092	5749	8077	15295
Independents*	56	64	222	237	185	45	72	154	298
Independents**	56	65	229	250	189	45	73	158	300
Ind* % Voting Lib	***19.64***	***4.69***	***9.01***	***6.75***	***20.00***	***33.33***	***18.06***	***16.23***	***21.48***
Ind** % Voting Lib	***19.64***	***6.15***	***11.79***	***11.60***	***21.69***	***33.33***	***19.18***	***18.35***	***22.00***

	Nowata	Okfuskee	Okmulgee	Ottawa	Rogers	Sequoya	Tulsa	Overall
Registered								
Democrat	4311	6158	18069	15462	24273	18493	149762	378589
Republican	2101	905	4739	5189	17244	3906	178781	265671
Independent	457	374	1741	2251	4035	1177	372257	63795
Libertarian	0	0	14	2	12	1	190	251
Reform	1	0	3	0	7	3	45	73
Total (01 11)	6870	7437	24566	22904	45571	23580	366035	708379
Total (22 08)	*6651*	*7314*	*23728*	*22600*	*42900*	*22691*	*345499*	*674968*
% increase	*3.29*	*1.68*	*3.53*	*1.35*	*6.23*	*3.92*	*5.94*	*4.95*
Vote								
Democrat	1133	2749	5721	5172	8524	6028	35840	118530
Republican	585	278	1321	136	5230	772	43009	67582
Libertarian	4	25	34	31	93	32	280	735
SQ691	1740	3087	7141	6447	14129	6901	81482	190906
Independents*	22	60	85	137	363	100	2443	4543
Independents**	22	60	99	139	375	101	2633	4794
Ind* % Voting Lib	***18.18***	***41.67***	***23.53***	***21.17***	***22.31***	***31.00***	***3.68***	***10.65***
Ind** % Voting Lib	***18.18***	***41.67***	***34.34***	***22.30***	***24.80***	***31.68***	***10.63***	***15.33***

*Assumes all registered Libertarians voted in Libertarian Primary
**Assumes no registered Libertarian voted in Libertarian Primary

Source: Author's calculations from data provided by State Election Board, April, 2002.

Impact on Republican and Democratic Primary Voters

How many registered Democrats or Republicans are likely to take Libertarian primary ballots should that be permitted? One possible assumption would be that the registered Democrats and Republicans would behave exactly like registered independents, in which case we would estimate this would be between 10.65 percent and 15.33 percent. But it would be a mistake not to note that these overall percents varied tremendously among the counties. This county variation suggests there are factors which can drive the number of registered independents, Republicans or Democrats taking Libertarian ballots, should that be permitted, up or down. In a given election the impact could be huge in one county's local races and minimal in similar races in another.

Supporting the assumption that registered Republican and Democrats would take Libertarian ballots in similar proportions as independents is the reasoning that independents took the Libertarian ballot not because they had an opinion on the relative merits of Richard Bloxham, Roger Boutin, jr., and Richard Prawdzienski and their programs for the Corporation Commission. Rather, the voters were confused, curious and contrary. We could assume registered Democrats and Republicans could be equally confused, curious and contrary. Voter confusion would manifest itself in undervoting with the Libertarian ballot. Undervoting would be a consequence of finding nothing of interest in the Libertarian primary portion of the ballot. Undervoting, in this case, would be returning a blank ballot on the Libertarian primary ballot proportion (there was only one Libertarian contest).

The minimum undervote in Republican and Democratic primary contests was just over four percent. We can assume many of these voted in other contests and the number of completely blank Republican and Democratic ballots was considerably under four percent of those handed out. The proportion of completely blank Libertarian primary portion of ballots, on the other hand, was over thirteen percent of those handed out. This indicates a considerable proportion of those asking for or given Libertarian primary ballots were confused or just curious. If we assume all registered Libertarians voted and none handed in a blank Libertarian primary ballot portion (undervoted) then twenty percent of the independents taking the Libertarian ballot handed it back with the Libertarian primary portion blank (97/484 x 100). The percent of Libertarian primary ballots turned in with the Libertarian primary portion blank varied from zero in Craig and Nowata to over twenty-seven percent in Mayes County.

We could assume independents took Libertarian primary ballots because there was no cost involved. They did not have to give up anything to take one. This would not be the case for voters registered as Republicans or Democrat. They would have to forgo their votes in the several primary contests of their party. *The assumption of the present litigation is that some registered Republicans and Democrats would be led to take a Libertarian primary ballot.* We can assume that a small percent of those doing so are motivated by a desire to see, say, Richard Bloxham, Roger Boutin, jr., or Richard Prawdzienski become the Libertarian Corporation Commission nominee – should they all run again, and are willing to forego their participation in their own party's primary to achieve that end. But we can assume a larger percent, probably a much

larger percent, would take the Libertarian ballot, in preference to their own party's, out of confusion or confusion mixed with curiosity. This would deprive them of their vote in their own party primary and likely affect the Republican and Democratic primary outcomes as well.

Table 2. Estimate of undervoting by party ballot August 22, 2000 Oklahoma Primary in 16 counties.

	Adair	Craig	Cherokee	Creek	Delaware	Haskell	McIntosh	Mayes	Muskogee
Vote									
Democrat	2773	3225	7585	6896	5971	3883	5118	5885	12027
Republican	886	651	1651	4112	2227	164	558	2034	2968
Libertarian	11	4	27	29	41	15	14	29	66
Minimum Undervote									
Democrat	14	33	104	183	62	63	48	206	208
Republican	22	20	40	83	52	1	17	40	31
Libertarian	1	0	6	1	5	2	3	8	4
Undervote %									
Democrat	0.50	1.02	1.37	2.65	1.04	1.62	0.94	3.50	1.73
Republican	2.48	3.07	2.42	2.02	2.33	0.61	3.05	1.97	1.04
Libertarian	9.09	0.00	22.22	3.45	12.20	13.33	21.43	27.59	6.06

	Nowata	Okfuskee	Okmulgee	Ottawa	Rogers	Sequoya	Tulsa	Overall
Vote								
Democrat	1133	2749	5721	5172	8524	6028	35840	118530
Republican	585	278	1321	1136	5230	772	43009	67582
Libertarian	4	25	34	31	93	32	280	735
Minimum Undervote								
Democrat	33	21	132	51	245	102	4763	6268
Republican	3	10	22	36	89	35	1024	1525
Libertarian	0	2	5	3	14	7	36	97
Undervote %								
Democrat	2.91	0.76	2.31	0.99	2.87	1.69	13.29	5.29
Republican	0.51	3.60	1.67	3.17	1.70	4.53	2.38	2.26
Libertarian	0.00	8.00	14.71	9.68	15.05	21.88	12.86	13.20

Source: Author's calculations from data provided by State Election Board, April, 2002.

Impact on Democratic and Republican Primaries

Table 3 shows the closeness of all 188 Republican and Democratic primary races across all seventy-seven counties. Over four percent were decided by less than one percent of the vote and over twenty-three percent by less than five percent. Almost half were decided by less than ten percent. Shifting those proportions of Republicans or Democrats away from their primary can and will affect Democratic and Republican primary outcomes.

Table 3. Closeness of Republican and Democratic August 22, 2000 Primary races

Race Decided By:*	Federal & Legislative Number	Percent	County Number	Percent	Overall Percent
Less than 1%	3	5.66	5	3.70	4.26
1-5%	6	11.32	30	22.22	19.15
5-10%	7	13.21	38	28.15	23.94
Over 10%	37	69.81	62	45.93	52.66
Total	**53**	**100.00**	**135**	**100.00**	**100.00**

*In two person race the percent over 50; in multiple candidate races the lesser of the percent necessary to avoid a runoff or produce a different runoff candidate

Source: Author's calculations from *Daily Oklahoman* August 23, 2000 page 15-A (County); *Oklahoma Election Results and Statistics 2000* (Federal & Legislative)

Hypothetical Example of Effect of Defection to Libertarians on Democratic Primary Results

I will illustrate the effect of opening the Libertarian primary ballot to Republicans and Democrats on the Republican or Democratic primary assuming certain parameters and structures. Let us assume 10,000 Democratic primary voters belongs to a minority (whatever that might mean) with probability .2 and to a majority with .8. We assume Minority voters will, if given the opportunity, defect to the Libertarian primary with probability .15 and Majority voters with probability .025. The net defection to the Libertarians, if given the opportunity, will be five percent of the voting Democrats. We assume two Democratic primary candidates, Smith and Jones. We assume the Minority vote for Smith with probability .29 and Jones with probability .71, should they be on the voter's ballot; the Majority vote for Smith with probability .55 and Jones with probability .45. Finally, we assume probability of defecting to the Libertarian primary and favored Democratic primary candidate are statistically independent. Table 4 presents these hypothetical parameters showing the outcome of the Democratic primary is a function of defections to the Libertarian primary. Of course, It would be a simple matter to hypothesize other parameters or assumptions that will have defection to the Libertarians not affect the hypothetical primary outcome.

Table 4. Effect on Hypothetical Democratic Primary of a Five Percent Defection to Libertarians Under Various Assumptions.

Proportion of Minority Defecting		Proportion Minority of Democrats		Proportion of Majority Defecting		Proportion Majority of Democrats		Proportion of Democrats Defecting Minority		Proporation of Democrats Defecting Majority		Total
.15	x	.20	+	.025	x	.80	=	.03	+	.02	=	.05
(votes)								300	+	200	=	500

Votes for Smith and Jones in Democratic Primary under assumption *no* Democrats defect to Libertarians – Jones wins.

	Minority Votes	Minority Percent	Majority Votes	Majority Percent	Total	Percent
Smith	580	29%	4400	55%	4980	49.8
Jones	1420	71	3600	45	5020	50.2
Total	2000	100	8000	100	10000	100

Votes for Smith and Jones in Democratic Primary under assumption fifteen percent of Minority and two and one half percent of Majority Democrats defect to Libertarians – Smith wins.

	Minority Votes	Minority Percent	Majority Votes	Majority Percent	Total	Percent
Smith	493	29%	4290	55%	4783	50.3
Jones	1207	71	3510	45	4717	49.7
Total	1700	100	7800	100	9500	100

Source: Author's calculations

Examples of Oklahoma Voters Confused by Election Procedures

Voters depend on election officials to speed them accurately through the voting process. When the election system confuses voters their chances of recording their preferences are reduced. This is particularly true for minority voters, those inexperienced with the voting system, and those with low educational accomplishments. But voter confusion is by no means limited to these groups. For example, in 1989 my colleague Anne Schneider and I published an analysis of rolloff[25] in Oklahoma County. We found printing races on the back of a ballot caused Judicial Retention rolloff to jump 18.25 in white majority precincts and 31.42 percent in African-American majority precincts.[26]

The 2000 general election provided further examples of voter confusion among partisans caused by electoral arrangements. The Democratic and Reform parties did not offer any candidates in the Third Congressional District yet voters were provided a Federal Officer straight party Democratic and Reform vote. In Payne County, entirely within the Third District, 3,162 voters used the Democratic straight party provision.[27] If we assume these were all confused Democrats and if we further assume the 9,319 votes Al Gore and Joe Lieberman collected in Payne

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[25] Failure of the voter to complete all ballot races or questions, produces undervotes.

[26] R. Darcy and Anne Schneider, 1989. "Confusing Ballots, Roll-Off, and the Black Vote," *Western Political Quarterly* 42 (September):358.

[27] Author's calculations from date provided by Payne County Election Board.

County[28] were all the voting Democrats, then one-third of the voting Democrats were confused into tossing away their votes. Thousands more in other Third District counties did the same thing. They voted for parties with no candidates.

In Oklahoma County, state house districts 82 and 100 had no Democratic candidates, yet the straight party provision attracted 3,567 uncounted Democratic votes. Some voters may also have voted for one of the actual candidates but many were lured into throwing votes away. It would take a hand count to tell how many. Around the state, uncounted votes were cast for Libertarians where there were no Libertarian candidates, for the Reform Party where there were no Reform candidates and for Democrats where there were no Democratic candidates. Some of this voting may have been the product of some careful and informed voter calculation. Most of it is due to voters confused by the ballot, which offered them something that would, in practice, deprive them of a vote rather than record their preference.

Comment on Deposition of Richard Winger 5 October 2001.

Richard Winger states:

> "California election law nurtures minor parties. At the same time, California election law makes it very difficult for independent candidates to get on the ballot. Oklahoma law is the opposite. Oklahoma election law makes it virtually impossible

[28] Oklahoma State Election Board. 2000. *State of Oklahoma Election Results and Statistics 2000* (Oklahoma City, Oklahoma):44.

> for minor parties to thrive, but Oklahoma election law makes it very easy for independent candidates (for office other than president) to get on the November ballot. As a result, minor parties in California are relatively successful and have a fair amount of prestige, and are in danger of being infiltrated by opportunistic persons who merely want to use the party to enable themselves to win a place on the general election ballot. There is no such danger for minor parties in Oklahoma; such opportunistic persons use the lenient independent candidate position procedures."[29]

First, we can notice Oklahoma voters do no favor minor party candidates preferring even one-shot and obscure independents.[30] When minor parties are on the Oklahoma ballot their candidates generally do not fare as well as independent candidates in the same race. This is shown in Table 5 which looks at all partisan races on the November 7, 2000 ballot in Oklahoma involving minor party or independent candidates. In each race having both an independent and minor party candidates, US House districts 3 and 5, the independent candidate gained an average of over six percent of the vote while the Libertarian candidate averaged less than three percent of the vote. Oklahoma voters shun Libertarian candidates when they have the opportunity to vote for them. Table 6 shows independent candidates average over three times the vote of Libertarian candidates. The Libertarian Party has

[29] Affidavit of Richard Winger, Plaintiffs' Exhibit 4 page 2 paragraph 6.

[30] Ross Perot as an independent Presidential candidate in 1992 gained 319,879 Oklahoma votes (23 percent), in 1996, as a Reform Party candidate, he gained 130,788 (10 percent).

existed in Oklahoma since 1980. To this date they have not found a way to communicate their message or candidates to the voters, or they *have* communicated their message and candidates and Oklahoma voters are not interested.

Oklahoma voters gave Argus W. Yandell over twice the votes for Congress in the Third District they gave the Libertarian candidate. Although on the ballot as an independent, Yandell campaigned as a candidate of the 'Southern Party' pledged to secede Oklahoma from the Union. I doubt many of the 14,660 votes he gained were from those who knew anything of his program or him. They were just avoiding the Republican and Libertarian candidates. But if we do assume voters were knowledgeable, then Yandell, with an impractical message, little effort, little money, and no visible organization, did far better than the Libertarians. A strong case can be made that it is not the ballot laws that motivate candidates to run as independents in Oklahoma. Some candidates realize their chances are better without the burden of a minor party label.

Table 5. Oklahoma Minor Parties and Independents: Nov. 2000 General Election

Registration November 1, 2000		
Independent	200204	8.96
Libertarian	701	0.03
Reform	251	0.01
Total	2233602	100.00
U.S. President		
Electors for	Number	Percent
Buchanan (Rfm)	9014	0.73
Browne (L)	6602	0.53
Total	1234229	100.00

U.S. Representative District 1		
Clem (L)	2984	1.49
Total	200005	100.00
U.S. Representative District 2		
Mavis (L)	6467	3.31
Total	195412	100.00
U.S. Representative District 3		
Mavis (L)	6730	4.23
Yandell (I)	14660	9.21
Total	159216	100.00
U.S. Representative District 4		
Ducey (Rfm)	4897	2.79
Johnson (L)	1979	1.13
Total	175684	100.00
U.S. Representative District 5		
Murphy (L)	2658	1.36
Maguire (I)	5930	3.03
Total	196022	100.00
U.S. Representative District 6		
Cristiano (L)	2435	1.51
Total	161176	100.00
Corporation Commission		
	Number	Percent
Bloxam (L)	21568	1.84
Total	1173285	100.00
Senate District 41		
Duffe (L)	698	1.87
Total	37350	100.00
House District 44		
Lein (L)	290	2.37
Total	12222	100.00
House District 74		
Daniel (L)	169	1.06
Total	15882	100.00

House District 82		
Galfin (L)*	2003	12.03
Total	16650	100.00
House District 100		
Powell (L)*	1556	14.72
Total	10570	100.00
Cleveland County Clerk*+		
Combs (I)	20611	34.06
Total	60516	100.00
Pottawatomie County Sheriff		
Jones (I)	1028	4.73
Total	21719	100.00

*Only other candidate; no Democratic Candidate (I) Independent; (L) Libertarian; (Rfm) Reform +72 of 75 precincts Source: Author's calculations from data reported in *State of Oklahoma Election Results and Statistics 2000* (Oklahoma City: State Election Board, 2000); *Daily Oklahoman* November 8, 2000 page 7-A "Local Issues."

Table 6. Mean Votes for Minor Party and Independent Candidates November 7, 2000 General Election

Group	Mean Vote Percent	Number
Libertarian	3.65	13
Reform	1.76	2
Independents	12.76	4

Source: Author's calculations from Table 5.

Second, Richard Winger claims that in Oklahoma, in contrast to California, 'opportunistic persons' will file as independents rather than 'infiltrate' minor political parties. The facts contradict his reasoning. In April 2000,

when I met her, Susan Ducey was campaigning for the Fourth District Republican congressional nomination. She told me J.C. Watts, the Republican incumbent, was not Republican or conservative enough. The card she gave me is shown below. By the time she filed it was as a Reform Candidate. Her calculations led her to make use of the Reform place on the ballot. Candidates will strategically file as independents, in a minor party, or in a major party primary, even in Oklahoma.

April, 2000 Susan Ducey Campaign Card

Third, it is difficult to measure what Richard Winger means by 'nurture' and 'thrive' when he contrasts California's nurturing election laws to those in Oklahoma where minor political parties have difficulty thriving.[31] One measure, however, might be the Libertarian Party performance in Presidential elections over the past two decades. This is shown in Table 7 below.

[31] Richard Winger testified in California in 1997 in California Democratic Party, et al. vs. Bill Jones. Secretary of State CIV S-2038 US District Court for the Eastern District of California. He was asked if a minor party ever won a contested partisan election in California and he responded the last time was 1936 (page 614 line 15). The last time a minor party won a contested partisan general election in Oklahoma was 1914 when five Socialists were elected to the state house and one to the state senate. Oklahoma does not keep track of county and municipal partisan elections so I have no information in that regard. Nevertheless, since 1936 – 66 years – minor parties have not thrived, by this measure, in either state, regardless of the election or ballot law differences.

Table 7. Libertarian Percent of Presidential Vote in California and Oklahoma 1980-2000.

Year	California	Oklahoma
1980	1.70	1.20
1984	0.50	0.70
1988	0.70	0.50
1992	0.40	0.30
1996	0.70	0.50
2000	0.46	0.50
Average	0.73	0.62
r	-0.67	-0.74
b	-0.04	-0.03
% Decline 1980-2000	-76.47	-58.33

Source: Author's calculations from *Guide to U.S. Elections,* 1994 (Washington, D.C.: Congressional Quarterly):465-468; *State of Oklahoma Election Results and Statistics* (Oklahoma City: State Election Board) 1980, 1984, 1988, 1992, 1996, 2000; State of California Secretary of State Election Website.

By 2000 the Libertarian Presidential candidate gained a larger percent of the Oklahoma than the California vote. The slope of a regression line calculated for each state (the year as the x variable, the Libertarian vote percent the y variable) shows a steeper decline (four one hundredths of one percent per year) in California compared to Oklahoma (three one hundredths of one percent per year). Over twenty years the decline is an estimated 0.8 percent in California and 0.6 percent in Oklahoma. If 1980 and 2000 are compared, by 2000 the Libertarians lost 76.47 percent of their 1980 California Presidential vote and only 58.33 percent in Oklahoma.

There was one November 7, 2000 statewide race in California, the United States Senate, one in Oklahoma, the Corporation Commission. Libertarians contested each gaining 1.76 percent of the California United States Senate vote and 1.83 percent of the Oklahoma Corporation Commission vote.[32] The Libertarians did better, not worse, in Oklahoma statewide, compared to California.

There are the fifty-two California races for the United States House of Representatives and the six similar races in Oklahoma. The best that any Libertarian did in Oklahoma races with both Republican and Democratic candidates[33] was 3.309 percent while a Libertarian managed 6.3 percent in one California race and 3.3, 3.6 and 3.8 percent in three other California races. But overall, the House elections do not show a thriving Libertarian party nurtured by California's election laws in sharp contrast to a bleak Oklahoma situation. As Table 8 shows, most California Libertarian House candidates did worse than the best achieved in Oklahoma. Further, Libertarians contested all Oklahoma House districts compared to only eighty-seven percent of the California districts.

[32] Author's calculations from *State of Oklahoma Election Results and Statistics 2000* (Oklahoma City, Oklahoma: State Election Board); State of California Secretary of State Election Website.

[33] I exclude races without both major party candidates as minor parties collect exaggerated 'protest' votes absent major party candidates.

Table 8. Libertarian Vote for Congress: Oklahoma and California 2000

Seats	Percents California	Oklahoma
Libertarian Contested with Republican & Democrat		
Libertarian Gained More than 3.30%	7.69	16.67
Libertarian Gained Less than 3.30%	71.15	66.67
Libertarian Contested without Republican or Democrat	7.69	16.67
No Libertarian	13.46	0.00
Total	**100.00**	**100.00**
N	51	6

Source: Author's calculations from *State of Oklahoma Election Results and Statistics 2000* (Oklahoma City: State Election Board); State of California Secretary of State Election Website.

Finally, there are the state legislative races. Libertarians contested a larger portion of the California than the Oklahoma legislative races and their best performance there was better than their best performance in Oklahoma (Table 9). In neither state, however, did the Libertarians threaten to actually win a contest.

Table 9. Libertarian Performance in 2000 California and Oklahoma State Legislative Races

	Percent Contested		Best Vote Percent*	
Chamber	**California**	**Oklahoma**	**California**	**Oklahoma**
Assembly-House	65.00	2.97	8.2	1.0
Senate	75.00	4.17	5.1	1.8

*Includes only races with both a Republican and Democratic party candidate.

There were no Libertarians in state senate races without Republican and Democratic party candidates. In a California assembly race without a Democrat a Libertarian gained 24 percent of the vote and in Oklahoma Libertarian state house candidates without Democrats in the race gained 12 percent and 14 percent of the vote.

Source: Author's calculations from *State of Oklahoma Election Results and Statistics 2000* (Oklahoma City: State Election Board); State of California Secretary of State Election Website.

By important indicators of party performance, votes for its presidential candidate, votes in statewide races, votes for United States House of Representatives, Oklahoma's election laws, rather than California's, have better nurtured the Libertarians and allowed them to thrive as best they could. There are other years that can be looked at and other races. Some will show California Libertarians doing better than their brothers and sisters in Oklahoma. And of course, California and Oklahoma differ in far more than election regulation and some of these factors, undocumented and unanalyzed by Richard Winger, rather than elections or

ballot laws, are determining the fate and fortunes of the Libertarian Party in Oklahoma and California.

/s/ Bob Darcy

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

No. 5:00-cv-01071 DEFENDANTS' TRIAL EXHIBIT

[Caption Omitted In Printing] NO. 9

SUPPLEMENTAL REPORT OF RICHARD WINGER

This second supplemental report is to be used as an update of my affidavit in *Beaver v. Clingman*, case number CIV-00-1071-L, in the Western District of Oklahoma.

2002 Primary Election in Utah

Utah held a primary on June 25, 2002, which had characteristics somewhat similar to the type of primary Oklahoma will be holding in the future, assuming the Libertarian Party of Oklahoma is permitted to invite all registered voters into its primary, and assuming it gets on the Oklahoma ballot in 2004. In the Utah primary of 2002, no one but registered Republicans and registered independents were permitted to vote in the Republican primary. But all registered voters were permitted to vote in the Democratic primary. Utah has no statewide offices up for election in 2002. The office at the top of the ballot in Utah in 2002 is U.S. House of Representatives. Of Utah's 3 congressional districts, only in the First district was a primary held for both the Democratic nomination and the Republican nomination.

In the Republican primary in the First congressional district, 42,237 valid votes were cast for member of Congress. In the Democratic primary in the same district, for the same office, 13,959 valid votes were cast. Therefore, for Congress, 1st district, 75.2% of the primary voters voted in the Republican primary, and 24.8% of the primary voters

voted in the Democratic primary. Both primaries were two-person contests.

In August 2002, there were 252,230 registered Republicans and only 60,495 registered Democrats in Utah. Of Utah voters who are registered in either one of those two parties, 80.7% are registered Republicans and only 19.3% are registered Democrats.

The Utah Democratic party is markedly weaker than the Utah Republican Party. However, the Utah Democratic Party, by inviting all voters to vote in its primary, succeeded in attracting a higher percentage of voters to vote in its primary, than its share of the two-party registration in Utah. In other words, the Utah Democrats have only 19.3% of the two-party registrants, yet attracted a primary vote of 24.8%. In my opinion, the Utah Democratic Party acted rationally by inviting all registered voters to vote in its primary.

Although the Libertarian and Green Parties are also qualified parties in Utah this year, no primary was held for them in 2002 since there were no offices for which more than a single individual was seeking those parties' nominations.

My sources of information for Utah are official primary election returns from the Utah State Elections office, and official registration figures, obtained from each Utah county.

Comment on Report of Dr. Robert Darcy of 23 May 2002

The Report seems to say that the Oklahoma Libertarian Party has as much support as the California Libertarian

Party. However, these specific indicators of party strength show that the California Libertarian Party is far stronger than the Oklahoma Libertarian Party:

1. There were only 171 registered Libertarians in Oklahoma, the last time the Oklahoma State Election Board tallied them, in January 2002[1]. In California there were 89,736 registered Libertarians, last time the California Secretary of State tallied them, October 7, 2002. Although California has a population nine times larger than Oklahoma, the ratio of registered Libertarians in Oklahoma, to California, is one to 525!

2. Only one Libertarian Party member holds public office in Oklahoma; 64 Libertarian Party members hold public office in California. The California list includes the Mayor of Moreno Valley (a city of over 100,000 population), the District Attorney of Mendocino County, one of the 5 County Supervisors in Calaveras County, and the Mayor of Saratoga.

3. Only 9 Libertarians are running for public office in Oklahoma in the November 5, 2002 election[2], whereas 348 Libertarians are running for public office in California in that election. Incidentally, Oklahoma has more state legislators than California does.

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[1] The Board will have new figures early in November, 2002, according to the person who answered the telephone at the State Board of Elections on October 29, 2002.

[2] The Libertarian Party candidates who are running for partisan public office on November 5, 2002, are all dues-paying members of the party. However, they are registered "independent", because Oklahoma election law does not permit independent candidates to be registered "Libertarian", even when the Libertarian Party is not recognized.

My sources of information are the websites of the California Libertarian Party, the Oklahoma Libertarian Party, the California Secretary of State, and the Oklahoma State Election Board.

The Report of Dr. Darcy points out that in the presidential elections of 1984 and 2000, the Libertarian Party presidential candidate received a higher percentage of the vote in Oklahoma than in California. This is probably because California voters had more choices on their presidential ballots than Oklahoma voters did. For instance, in the November 2000 election, Oklahoma voters were unable to vote for Ralph Nader, because his name did not appear on the ballot and Oklahoma is one of only five states that bans all write-in votes. Undoubtably [sic] many voters who desired to vote for Ralph Nader in Oklahoma, frustrated that they could not do so, voted for the Libertarian Party presidential candidate instead. In California, there were 7 presidential candidates on the November 2000 ballot (including Ralph Nader), as well as a write-in space.

The Report of Dr. Darcy mentions Susan Ducey, a congressional candidate in 2000 who first planned to run in the Republican primary, but instead opted to run in the Reform Party primary. The Report says Susan Ducey ran in the Reform Party primary for strategic reasons. However, the Report reprints her calling card, which says that she is "conservative" and "pro life". During the 2000 campaign, the Reform Party nominated Patrick Buchanan for president, who was adamently [sic] "pro life" and "conservative", and the Reform Party platform was amended to include a pro-life plank and many other conservative planks. Therefore, it would seem Susan

Ducey joined the Reform Party out of conviction, and not just to gain a place on the ballot.

SIGNED /s/ Richard Winger Oct 29, 2002

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

No. 5:00-CV-01071

[Caption Omitted in Printing]

PLAINTIFFS'
TRIAL EXHIBIT
NO. 1

NEW RULES FOR VOTING IN THE OKLAHOMA PRIMARY AND RUN-OFF ELECTIONS IN THE YEAR 2004

1. Voters registered as Republicans may vote in either the Republican **or** Libertarian Primary Election.

2. Voters registered as Democrats may vote in either the Democratic **or** Libertarian Primary Election.

3. Voters registered as Libertarians, Reform, or Independent may **only** vote in the Libertarian Primary Election.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

No. 5:00-CV-01071

[Caption Omitted in Printing]

PLAINTIFFS'
TRIAL EXHIBIT
NO. 2

NEW RULES FOR VOTING IN THE OKLAHOMA PRIMARY AND RUN-OFF ELECTIONS IN THE YEAR 2004

1. In the Democratic Primary Election, only registered Democratic voters may vote.

2. In the Republican Primary Election, only registered Republican voters may vote.

3. In the Libertarian Primary Election, any registered voter may vote.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

ANDREA L. BEAVER, et al., Plaintiffs,	)	
v.	)	Case No. CIV-00-1071-F
MICHAEL CLINGMAN, Secretary of the Oklahoma State Election Board, et al., Defendants.	)	

AMENDED PROPOSED FINAL PRETRIAL REPORT

(Filed Nov. 25, 2002)

All counsel who will appear at trial:

Appearing for Plaintiffs: James C. Linger

Appearing for Defendants: Wellon B. Poe, Jr., Assistant Attorney General, Office of the Attorney General.

JURY TRIAL ___ NONJURY TRIAL _X_

1. BRIEF PRELIMINARY STATEMENT. State *briefly* and in ordinary language the facts and positions of the parties (appropriate for use during jury selection in jury cases).

All the Plaintiffs are citizens of the State of Oklahoma and the United States of America, registered voters of the State of Oklahoma, and wish to have the right to cast their vote in future Libertarian Primaries to be held in Oklahoma. The instant case involves the opening up of the Libertarian Primary and Run-off elections in Oklahoma to all registered voters whether they be Libertarian,

Independent, Republican, Democratic, or Reform. The Libertarian Party of Oklahoma has passed resolution to open up their future Primary and Run-off elections to all Oklahoma registered voters.

The Defendants are the Oklahoma State Election Board, its Secretary, and its members. The Defendants oppose the Libertarian Party of Oklahoma being given the option to open up its Primary and Run-off elections in Oklahoma to registered members of other political parties because the Defendants feel that it would be disruptive and affect the integrity of other political parties and their primary elections.

2. JURISDICTION. The basis on which the jurisdiction of the Court is invoked.

This is an action for declaratory and injunctive relief. The basis on which the jurisdiction of the Court is invoked is pursuant to tit. 28 U.S.C. §§ 1343(3), 1343(4), 2201, and 2202, and tit. 42 U.S.C. § 1983. Venue of the Court is invoked pursuant to tit. 28 U.S.C. § 1391. The rights, privileges, and immunities sought to be declared and redressed are those secured by the First and Fourteenth Amendments to the United States Constitution.

3. STIPULATED FACTS. List stipulations as to all facts that are not disputed or reasonably disputable, including jurisdictional facts.

1. All parties are properly before the Court.
2. All parties have been correctly designated.
3. Venue of this Court is properly invoked.

4. In the year 2000, the filing period for political party nominations in the State of Oklahoma was on July 10, 11, and 12, 2000.

5. In the year 2000, the filing deadline for contesting a political party's candidates in the State of Oklahoma was by July 14, 2000, at 5:00 p.m.

6. In the year 2000, the political party Primary Election in the State of Oklahoma was held on August 22, 2000. In-person absentee voting began August 17, 2000.

7. In the year 2000, the Run-off Election in the State of Oklahoma was held on September 19, 2000.

8. In the year 2000, the General Election in the State of Oklahoma was held on November 7, 2000.

9. At present, an Oklahoma voter may only register to vote as Republican, Democratic, Reform, Libertarian, or Independent.

10. Only Oklahoma voters registered as Republicans may vote in the Republican Party Primary Election. This is by designation of the Oklahoma Republican Party.

11. Only Oklahoma voters registered as Democratic may vote in the Democratic Party Primary Election. This is by designation of the Oklahoma Democratic Party.

12. The Reform Party has allowed Oklahoma voters who are registered as Reform or Independents to vote in the Reform Party Primary Election. This is by designation of the Oklahoma Reform Party. However, the Reform Party has never had a Primary or Run-off Election contest in the State of Oklahoma.

13. The Libertarian Party, pursuant to Oklahoma statutes, allows Oklahoma voters who are registered as Libertarian or Independents to vote in the Libertarian Party Primary Election. This is by designation of the Oklahoma Libertarian Party. The Libertarian Party would like to allow all Oklahoma voters, regardless of their political affiliation, to vote in Libertarian Party Primary Elections.

14. On May 31, 2000, the Voter Registration and Ballot Access Coordinator for the Libertarians in the State of Oklahoma turned in a designation to the Secretary of the Oklahoma State Election Board notifying the Oklahoma State Election Board that the Libertarian Party of Oklahoma consented to voting by all registered Oklahoma voters – whether they were Libertarian, Independent, Republican, Democratic, or Reform – to vote in the Libertarian Primary and Run-off Elections in the State of Oklahoma for the year 2000.

15. On May 31, 2000, Lance Ward, then Secretary of the Oklahoma State Election Board, accepted the Libertarian Party of Oklahoma's request that Independents could vote in the Libertarian Party Primary and Run-off Elections in the year 2000, but did not accept said designation from the Libertarian Party of Oklahoma as to permitting Republican, Democratic, Reform, or any other recognized political party or political association voters voting in the Libertarian Party Primary and Run-off Elections for the State of Oklahoma for the year 2000.

16. On June 21, 2000, the Libertarian Party of Oklahoma was notified that it had achieved political party status in the State of Oklahoma pursuant to OKLA. STAT. tit. 26, § 1-108. Prior to June 21, 2000, the Libertarian

Party of Oklahoma was recognized as a political organization pursuant to OKLA. STAT. tit. 26, § 1-109(B).

17. There were 141 registered Libertarian Party voters in the State of Oklahoma as of November 5, 1996.

18. In the year 1996, the Libertarian Party of Oklahoma permitted independent voters to vote in the Libertarian Primary Election conducted on August 27, 1996. The total vote cast in the Libertarian Primary Election for United States Senator on August 27, 1996, was 2,940 votes. Since only Libertarians and Independents could vote in the Libertarian Party's Primary, and since there were no more than 141 registered Libertarian Party voters, the vote in the Libertarian Party's Primary Election on August 27, 1996, for United States Senator, means that at least 95% of the voters casting votes in the aforesaid Libertarian Party Primary Election were Independent voters.

19. There are currently more than 2,100 voting precincts in the State of Oklahoma. Pursuant to OKLA. STAT. tit. 26, §§ 2-123 and 1-128.1, each precinct must have a minimum of three officials working an election, totaling more and [sic] 6,300 precinct workers working each election.

20. Oklahoma statutes require that the Oklahoma Election Board provide training for all members and employees of each county election board every two years. In addition, each precinct official is to receive in-person training every two years. The training conducted by the State Election Board and each respective County Election Board for the 2000 election cycle has already been completed.

21. There were 360 registered Libertarian party voters in the State of Oklahoma as of June 30, 2000.

22. In the year 2000, there was no political party Primary Election conducted for the Reform Party in Oklahoma.

23. In the year 2000, the only statewide political party Primary Election conducted in the State of Oklahoma on August 22, 2000, involved the Libertarian Party Primary for Corporation Commissioner.

24. There were three candidates for the Libertarian nomination for Corporation Commissioner in Oklahoma at the Primary Election to be conducted on August 22, 2000, to-wit: Richard Prawdzinski of Edmond, Oklahoma; Whitney L. Bootin, Jr. of Norman, Oklahoma; and Roger Bloxham of Tulsa, Oklahoma.

25. There were no statewide Primary Elections for the Republican or Democratic parties of Oklahoma for the Primary Election held on August 22, 2000.

26. In the year 2000, the Republican Party held Primary Elections in the State of Oklahoma on August 22, 2000, for United States Representative for Districts 1, 2, 4, and 5, but not in Districts 3 and 6.

27. In the year 2000, the Democratic Party held Primary Elections in the State of Oklahoma on August 22, 2000, for United States Representative for Districts 1, 2, and 6, but not in Districts 3, 4, and 5.

28. There were several Primary and Runoff Elections conducted by the Republican and Democratic parties in various State Senate and State House of Representative

districts in Oklahoma in 2000 as well as local county and municipal races.

29. Preparation and setup for the 2000 Primary Election ballots began on July 13. Lance Ward, then Secretary of the Oklahoma State Election Board, expected ballot proofing to begin no later than July 18 and ballot printing for the 2000 Primary to begin no later than July 20.

30. That the Libertarian Party of Oklahoma has passed By-laws and Resolutions which permit all registered Oklahoma voters – whether they be Republican, Democratic, Reform, Independent, or Libertarian – to vote in any Primary or Run-off Election conducted by the Libertarian Party in any election in the year 2000 or in any future Primary or Run-off Election conducted in the State of Oklahoma.

31. If the Libertarian Party of Oklahoma were allowed to open its Primary Election to all voters at the individual voters choice, each voter would only be able to receive one ballot selection in order to cast his or her vote.

32. The Libertarian Party of Oklahoma has been on the Oklahoma ballot in every presidential election from 1980 through 2000, and has had primary elections in 1980, 1996, and 2000.

33. There were 770 registered Libertarian voters in the State of Oklahoma as of January 15, 2001.

34. The Libertarian Party of Oklahoma is currently recognized as a political organization in the State of Oklahoma pursuant to OKLA. STAT. tit. 26, § 1-109(B).

35. There were 286 registered Libertarian voters in the State of Oklahoma as of November 1, 2002.

36. In the year 2004, the Primary Election will be held on August 24, 2004, the Run-off Election will be held on September 21, 2004, and the General Election will be held on November 2, 2004.

The following facts, though not admitted, will not be contested at the trial:

37. The Libertarian Party of Oklahoma feels that it would be advantageous to it as a political party and important to its members and all voters of Oklahoma if their rights to political association and political speech pursuant to the First and Fourteenth Amendments to the United States Constitution were furthered by opening up the Libertarian Party Primary and Run-off Elections to all Oklahoma voters regardless of political affiliation.

38. The Libertarian Party of Oklahoma and its members feel that opening up of the Libertarian Party of Oklahoma's Primary and Run-off Elections would help them reach out to Libertarian oriented voters of other political affiliations, produce a more viable Libertarian candidate for the General Election, create favorable publicity for the Libertarian Party, and encourage further expansion and growth of the Libertarian philosophy. It has also been the experience of most Libertarians that many individuals not formally affiliated with the Libertarian Party share Libertarian views on certain issues so as to support the advancement of common political objectives favored by the Libertarians.

39. There are a number of voters in the State of Oklahoma who are registered in political parties other

than the Libertarian Party who wished to vote in the Libertarian Party's Primary and Run-off Elections in the State of Oklahoma in the year 2000 and wish to vote in future Primary and Run-off Elections to be conducted by the Libertarian Party.

40. The Libertarian Party of Oklahoma intends to seek political party recognition in the State of Oklahoma, pursuant to OKLA. STAT. tit. 26, § 1-108, and run candidates for elective office in the election to be conducted in Oklahoma in the year 2004.

41. There are a number of Libertarians who are interested in running in Libertarian Primaries to be conducted in the State of Oklahoma in the year 2004. Among these individuals are Roger Bloxham, Lynn Atherton, and Robert Murphy, all of whom desire to seek the Libertarian nomination for U.S. Senator from Oklahoma in the year 2004.

4. LEGAL ISSUES. State separately, and by party, each disputed legal issue and the authority relied upon.

Plaintiffs:

a. Whether OKLA. STAT. tit. 26, Sec. 1-104 is unconstitutional under the First and Fourteenth Amendments to the U.S. Constitution to the extent that it does not allow a political party to permit registered voters other than members of the political party in question and Independent voters to vote in a political party's primary and run-off elections in Oklahoma.

b. Whether the Plaintiffs herein are entitled to have OKLA. STAT. tit. 26, Sec. 1-104 declared unconstitutional to the extent that it prevents the Libertarian Party of Oklahoma from opening its Primary and Run-off elections

to registered Oklahoma voters who are not registered as either Libertarian or Independent.

Authority relied upon: United States Constitution, Amendments I and XIV; tit. 42 U.S.C. § 1983; OKLA. STAT. tit. 26, § 104; *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1996); *California Democratic Party v. Jones*, 530 U.S. 567 (2000); *Cool Moose Party v. State of Rhode Island*, 183 F.3d 80 (1st Cir. 1999).

Defendants:

a. Whether the challenged election statutes are unconstitutional as written and/or applied.

b. Whether Plaintiffs are entitled to the declaratory and injunctive relief as requested in their Amended Complaint.

Authority relied upon: United States Constitution, Amendments I and XIV; OKLA. STAT. tit. 26, § 1-104. *California Democratic Party v. Jones*, 530 U.S. 567 (2000); *Rosario v. Rockefeller*, 410 U.S. 752 (1973); *Storer v. Brown*, 415 U.S. 724 (1973).

5. CONTENTIONS AND CLAIMS FOR DAMAGES OR OTHER RELIEF SOUGHT.

A. Plaintiffs:

1. Declaring that the said required actions which prevent the Libertarian Party of Oklahoma from allowing registered voters who are not members of the Libertarian Party or Independent voters from voting in the Libertarian Primary and Run-off Elections in Oklahoma, pursuant to OKLA. STAT. tit. 26, §§ 1-104(A) and 1-104(B)(4) are illegal and unconstitutional, particularly as applied to the facts in the case at bar, in that they are in violation of the

First and Fourteenth Amendments to the U.S. Constitution and Title 42 U.S.C. § 1983.

2. Entering a permanent injunction restraining, prohibiting, and enjoining the Defendants to the instant action, their agents, employees, and servants, and all persons in active concert and participation with them, from enforcing, applying, or implementing the aforesaid complained of state election laws as applied to the instant Plaintiffs and all similarly situated individuals who wish to vote in any Primary or Run-off Election conducted by the Libertarian Party in Oklahoma.

3. Awarding Plaintiffs reasonable costs and expenses in this action, including attorney fees pursuant to the Civil Rights Attorney Fees Awards Act of 1976, 42 U.S.C. § 1988; and

4. Granting Plaintiffs such other relief as to which they may be entitled and which the Court may deem equitable and just.

B. Defendants:

Defendants contend that none of the statues challenged in this action are unconstitutional as written and/or applied and that Plaintiffs are not entitled to any declaratory or injunctive relief or any attorneys' fees, costs or any other relief.

6. EXHIBITS. The following exclusionary language *MUST* be included:

Exhibits not listed will not be admitted by the Court unless good cause be shown and justice demands their admission.

A. Plaintiffs

Number	Title/ Description (Pre-marked for trial)	Objection	Federal Rule of Evidence Relief Upon
1.	New Rules for Voting in the Oklahoma Primary and Run-off Elections in the Year 2004 (by registration);	Yes	402
2.	New Rules for Voting in the Oklahoma Primary and Run-off Elections in the Year 2004 (by primary);	Yes	402
3.	Curriculum Vitae of Richard Winger	Yes	801,802
4.	Expert Reports of Richard Winger	Yes	801,802
5.	Deposition of Robert Darcy, for impeachment purposes		

B. Defendants

Number	Title/ Description (Pre-marked for trial)	Objection	Federal Rule of Evidence Relief Upon
1.	Oklahoma State Election Board 1996 election results for all state, county or local primaries, runoffs and general elections		
2.	Oklahoma State Election Board 1998 election results for all state, county or local primaries, runoffs and general elections		

3. Oklahoma State Election Board 2000 election results for all state, county or lo l primaries, runoffs and general elections

4. Oklahoma State Election Board 2002 election results for all state, county or local primaries, runoffs and general elections

5. Oklahoma State Election Board voter registration/political party affiliation totals for all 1996 election cycles

6. Oklahoma State Election Board voter registration/political party affiliation totals for all 1998 election cycles

7. Oklahoma State Election Board voter registration/political party affiliation totals for all 2000 election cycles

8. Oklahoma State Election Board voter registration/political party affiliation totals for all 2002 election cycles

9. Transcript of proceedings in *California Democratic Party, et al. v. Jones*, Case No. CIV-S-96-2039 (E.D. Ca.)

10. Transcript of hearing on Preliminary Injunction in *Beaver, et al. v. Ward, et al.*, Case No. CIV-00-1071-F

11. Transcript of testimony of Richard Winger in *California Democratic Party, et al v. Jones*, Case No. CIV-S-96-2039 (E.D. Ca.)

12. Expert report prepared on behalf of Defendants by Robert Darcy — Yes — 801,802

13. Curriculum Vitae of Robert Darcy — Yes — 801,802

14. Rules of the Oklahoma State Election Board

15. Oklahoma State Election Board statutory provisions
    - 12A. 26 O.S. § 101
    - 12B. 26 O.S. § 102
    - 12C. 26 O.S. § 103
    - 12D. 26 O.S. § 104
    - 12E. 26 O.S. § 107
    - 12F. 26 O.S. § 108
    - 12G. 26 O.S. § 109
    - 12H. 26 O.S. § 110

16. Deposition of Robert Darcy

17. Deposition of Richard Winger, for impeachment purposes.

7. WITNESSES. The following exclusionary language *MUST* be included.

No unlisted witness will be permitted to testify as a witness in chief except by leave of Court when justified by exceptional circumstances.

A. Plaintiffs:

1. Richard P. Prawdzienski, Chairman of the Oklahoma Libertarian Party; testimony as to future Libertarian primaries;

2. Robert T. Murphy (if necessary), past Chairman of the Oklahoma Libertarian Party; testimony as to past and future Libertarian party primaries;

3. Steve Galpin (if necessary); testimony as to future Libertarian primary elections;

4. Floyd Turner (if necessary); testimony as to desire to vote in Libertarian primary elections; and

5. Richard Winger, expert witness on election law, ballot formats, primary elections, differences in state election laws as to primary elections, and effects of open and closed primary elections.

Name Address Proposed Testimony

B. Defendants:

1. Michael Clingman, Secretary, Oklahoma State Election Board, c/o Wellon B. Poe, Rules of the State election Board, state statutes; primary Oklahoma election results, effect of open primary on voters, candidates, political parties and primary and runoff elections.

2. Jay Parmley (if necessary), Chairman, Oklahoma Democratic Party; effect of open party primary on Democratic Party primary and run-off voter turnout and results.

3. Chad Alexander (if necessary), Chairman, Oklahoma Republican Party; effect of open party primary on Republican Party primary and run-off voter turnout and results.

4. Lance Ward, former Secretary of Oklahoma State Election Board, c/o Wellon B. Poe; prior election results; state statutory provisions; rules of State Election Board; effect of open primary on political parties, voters, candidates and primary and runoff elections.

5. Carol Slater (if necessary), Oklahoma State Election Board, c/o Welton B. Poe; prior election results; state statutory provisions, rules of State Election Board.

6. Robert Darcy, Oklahoma State University, will provide expert testimony as to the effects of primaries on Democratic, Republican and Libertarian Parties.

8. ESTIMATED TRIAL TIME For liability N/A
For damages N/A One and one half day

9. BIFURCATION REQUESTED: Yes ___ No X

10. POSSIBILITY OF SETTLEMENT:

Good ___ Fair ___ Poor X

All parties approve this order and understand and agree that this order supersedes all pleadings, shall govern the conduct of the trial, and shall not be amended except by order of this Court.

/s/ James C. Linger
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APPROVED this ___ day of November 2002.

STEPHEN P. FRIOT
UNITED STATES DISTRICT
JUDGE